United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4266

United States Court of Appeals

FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO AND NEW YORK SHIPPING ASSOCIATION, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON CROSS-PETITION TO ENFORCE AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF
INTERVENOR CONSOLIDATED EXPRESS, INC.

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the decision of the National Labor Relations Board ("NLRB") that the so-called Rules on Containers agreed to between the International Longshoremen's Association, AFL-CIO, ("ILA") and the New York Shipping Association ("NYSA") had an unlawful secondary objective in violation of Sections 8(b)(4) and (e) of the National Labor Relations Act, since these agreements were tactically calculated to acquire for ILA members container consolidation work which had traditionally been performed off the pier by non-ILA employees of Consolidated Express, Inc. and other consolidators?

2. Whether the NLRB properly considered the non-ILA work tradition as predating, or at least paralleling, any arguable ILA tradition with respect to container consolidation work?

3. Whether substantial evidence supports the NLRB's decision that ILA had waived or abandoned whatever claim it might have had to off pier consolidation work, in light of both the 1959 ILA-NYSA collective bargaining agreement recognizing a tradition of consolidation work by non-ILA personnel and the long history thereafter of off pier container consolidation by non-ILA personnel?

REFERENCES TO PARTIES, RULINGS AND STATUTES

Consolidated Express, Inc. ("CEI"), an intervenor on respondent's side here, was a charging party before the NLRB. The company is a freight consolidator and a non-vessel-owning common carrier (NVOCC) that has been consolidating cargo for maritime shipment in the U.S.-Puerto Rico trade since 1965 under its present name and for sixteen years before that under a predecessor corporation named Valencia Baxt Express, Inc. ("Val-Baxt"). Twin Express, Inc. ("Twin"), also an intervenor here and a charging party below, has been a consolidator in the U.S.-Puerto Rico trade since 1967. Truckdrivers Local Union No. 807, International Brotherhood of Teamsters, ("Teamsters Local 807"), another intervenor on respondent's side and an intervenor in the proceedings below, is the representative of the employees who have been performing container consolidation work for CEI and other consolidators. The NLRB is the respondent

Petitioners include NYSA, which is an incorporated membership association of stevedores, steamship carriers and other employers of longshore labor in the port of New York. The only steamship carriers engaged in the Puerto Rican trade that are employer members of NYSA are Sea-Land Service, Inc. ("Sea-Land"), Seatrain Lines, Inc. ("Seatrain") and Trans-American Trailer Transport, Inc. ("TTT"). The other petitioner is ILA, an unincorporated labor organization, which is the

certified bargaining representative for the deep-sea longshoremen.

The decision and order of the National Labor Relations Board dated December 4, 1975 is reported in 221 NLRB No. 144 and is contained in the Joint Appendix at 186a.[1/] The case has not been before this Court under any style or number. Relevant statutory provisions are contained in the addendum to the brief of ILA.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Under the guise of "work preservation," ILA and NYSA seek to acquire work heretofore performed by CEI with employees represented by another union. This case is yet another instance in which a labor union representing longshoremen seeks to enforce a contractual provision which illegally requires that the work of stuffing and stripping[2/] containers of consolidators--work that has historically been performed outside the docks--be brought to the docks and be assigned to longshoremen employed by stevedoring

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1/ References to the record below are cited to the pages of the Joint Appendix.

2/ The terms "stuffing" and "stripping" are used to describe the processes of filling and emptying a container, and came into use in order to distinguish this process from that of "loading" and "unloading" a ship with containers or other cargo. See 247a, 884a.

companies. See International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co.), 208 NLRB 994, 85 LRRM 1300 (1974), enforced sub. nom. Pacific Maritime Ass'n v. NLRB, 515 F.2d 1018 (D.C. Cir. 1975), pet. for cert. filed, 44 U.S.L.W. 3323 (Nov. 25, 1975) (No. 75-684) [hereinafter cited as Cal Cartage].

CEI, like other consolidators, has had an independent history of providing for its own customers specialized express container freight service--an essential function of which includes the stuffing and stripping of containers at CEI's own facilities outside the pier. Since the introduction of containers in the late 1940's, CEI and its predecessor, Val-Baxt, have had a tradition of consolidating containers with teamster-represented personnel, and of shipping such containers without stripping and restuffing or any other interference by the ILA.

The immediate situation giving rise to this case occurred in 1973. Despite the long tradition of off pier container consolidating work by CEI and other consolidators employing teamsters, ILA sought to acquire the consolidating work previously done by non-ILA personnel through the vehicle of the so-called Rules on Containers. The Rules on Containers adopted in 1968 by ILA and NYSA, were amended and first enforced against established consolidators such as CEI and Twin in 1973. These Rules required that NYSA members cease supplying containers to consolidators such as CEI; that there be a confiscatory fine of $1,000 per container for each violation

of the Rules;[3] and that longshoremen strip and restuff all containers shipped by consolidators such as CEI and Twin.

The Rules are not subtle: their manifest purpose and effect were to drive CEI and other consolidators employing non-ILA personnel out of business and, thus, force the work to the pier for longshoremen to perform. It is this manifest "work acquisition" that is at issue in this case.

II. PROCEEDINGS BELOW

Injunctive Relief under Section 10(l). Confronted with the debilitating effect of the enforcement of the Rules on Containers, CEI and Twin filed charges with the NLRB. Believing that Sections 8(b)(4) and 8(e) of the National Labor Relations Act ("NLRA") had been violated, the Regional Director petitioned the U.S. District Court for New Jersey for a preliminary injunction pending final disposition of the matter before the NLRB.[4] The major factual dispute at the hearings focused upon NYSA and ILA's contention that the ILA had traditionally stripped and restuffed consolidated LTL[5] containers

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3/ This amount actually exceeded the tariff charged by the shipping companies for shipping such containers. See the tariffs attached hereto as Addendum A.

4/ Balicer v. International Longshoremen's Ass'n, AFL-CIO, 364 F. Supp. 205 (D.N.J.), aff'd, 491 F.2d 748 (3d Cir. 1973).

5/ "LTL" (less than trailer load) and "LCL" (less than container load) are terms which merely indicate a quantity of freight less than that which a container can accommodate.

which had been stuffed off the pier, and in so doing had uniformly rehandled CEI's containers. 364 F. Supp. at 225. As to this issue, District Judge Lacey found that CEI had traditionally consolidated containers using teamster employees at off pier facilities and that the alleged ILA rehandling had not in fact occurred.

The court also noted that the non-ILA work tradition with respect to container consolidation predated or at least paralleled any arguably related ILA work history. In such circumstances, the court found "substantial" the Board's legal argument--namely, that application of the Rules on Containers to obtain for ILA labor the traditional off dock work of stuffing and stripping CEI's containers constituted unlawful work acquisition. Accordingly, the Court enjoined enforcement of the Rules on Containers to prevent CEI from being forced out of business.[6/]

Decision of the NLRB. The record established in the injunction proceedings, supplemented by affidavits, was agreed by all parties to constitute the record for the unfair labor practice charges before the NLRB. Initially the case was submitted to Administrative Law Judge ("ALJ) Ordman for decision and recommended order

Agreeing with Judge Lacey, the ALJ found that, until the recent enforcement of the Rules on Containers in March of

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6/ Judge Lacey subsequently issued a similar injunction in favor of Twin. Balicer v. ILA, 86 LRRM 2559 (D.N.J. 1974).

1973, "the preponderance of the evidence, testimonial and documentary, establishes that, with a few exceptions noted hereunder, Consolidated [CEI's] containers passed over the docks without rehandling by longshoremen on the docks," and that "containers loaded by Consolidated went through the Port of New York without interference." (154a-155a, 156a; emphasis added.)

Despite this history and notwithstanding the finding that the "evidence in the record as to stuffing and stripping of containers by ILA longshoremen on the docks of New York is relatively sparse" (164a n.8), the ALJ concluded that the ILA's history of handling loose cargo delivered at the pier "could predicate a continuing claim of entitlement to the continued handling and 'unitizing' of such cargo." (162a.) There was no rationale offered for the conclusion that a tradition of ILA handling of loose cargo delivered to the pier establishes ILA's claim to off pier stuffing and stripping of consolidated containers.

On review of the ALJ's decision, the NLRB agreed that the outcome of the case depended on whether the Rules on Containers, and the ILA's activities in enforcing those Rules, had an unlawful "work acquisition" objective. (195a.) The Board noted the lengthy work tradition of off pier sorting and consolidation of freight by companies employing teamsters and non-ILA labor. Like the ALJ, the Board found that CEI and Twin had traditionally functioned as independent freight

consolidators without ILA stripping and restuffing of containers, or any other interference. The traditional work of CEI and Twin of stuffing and stripping consolidated containers was, in the Board's opinion, clearly outside the tradition of the on pier work performed by longshoremen incident to loading and unloading vessels. (197a-198a.)

The Board concluded that the ILA was demanding no less that that "the work traditionally performed off the pier by the employees outside the longshoremen unit [be] taken over and performed at the pier by longshoremen represented by ILA." (198a.) The established work tradition of consolidators such as CEI, using non-ILA employees, rendered ILA's attempt to force that work to the dock manifest "work acquisition."

The Board also found that ILA had waived whatever hypothetical claim it might have had by its 1959 collective bargaining agreement and by its practices both before and after that agreement. Section 8(a) of the 1959 agreement provided that "[a]ny employer shall have the right to use any and all type of containers without restriction or stripping by the union." Consistent with this language and its past practices even before 1959, ILA made no attempt to acquire the stuffing and stripping work of established consolidators such as CEI and Twin. Not until 1973, with the initial enforcement of the Rules of Containers, did ILA interfere seriously with the

passage of CEI's and Twin's containers in order to acquire the consolidation work.[7/]

As a final point, the NLRB evaluated the implications of ILA's claim on the economic personality of the shipping industry. The Board recognized that the Rules of Containers, if enforced, would mark the virtual extinction of consolidators such as CEI and Twin. Moreover, the Board noted that ILA's claim logically extended to all containers, not just consolidated containers. The impact of such a claim on the shipping industry would be "enormous." (201a.)

For these reasons, the Board found that the Rules on Containers and ILA's activities were aimed at secondary rather than primary objectives. By "maintaining, giving effect to, and enforcing" the Rules on Containers, NYSA and ILA had violated Section 8(e) of the Act. Additionally, the Board held that the ILA had violated Section 8(b)(4) of the Act by "threatening, restraining and coercing" NYSA and its members for the object of forcing them to cease doing business with CEI and Twin. (201a.)

ILA and NYSA then filed a petition for review in this Court, to which the NLRB responded with a cross-petition

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7/ 199a-200a. Though not enforced against established consolidators such as CEI and Twin (747a), the 1968 Rules on Containers were enforced to prevent new consolidators from entering the business. See Intercontinental Container Trans. Corp. v. NYSA, 426 F.2d 884, 886 (2d Cir. 1970).

for enforcement of its order. CEI, Twin, and Local 807 have intervened on respondent's side.

III. FACTUAL BACKGROUND

The jurisdiction of longshoremen historically has been defined in terms of location--namely the docks. The work of longshoremen involves principally the loading and unloading of ships and other incidental functions performed at the docks. The history of consolidation and containerization has, from the beginning, involved a significant off dock work tradition by teamsters and other non-ILA personnel. Despite this tradition, ILA sought to acquire the off dock work of stuffing and stripping consolidated containers--work which clearly had never been done by the ILA. A brief review of the history of CEI, the consolidation business, and the role of teamsters with respect to cargo and container handling places the non-longshoremen work tradition in clear perspective.

The History of CEI. CEI and its predecessor, Val-Baxt, for many years have performed specialized common carrier services which include the cargo consolidating and container stuffing and stripping at their own facilities. In 1949, Val-Baxt began operations as an NVOCC, providing express freight service on a "door-to-door" basis between New York and San Juan. (72a-73a, 794a.) As an NVOCC, Val-Baxt stuffed shipments into containers, shipped the containers between the above-mentioned ports via maritime common carriers

on a single bill of lading, stripped such containers at its own warehouse facilities, and distributed the shipments to their ultimate consignees. (72a-75a, 724a-725a.)

Some containers were loaded with the freight of a single shipper, sometimes referred to as "straight" loads.[8/] Most containers, however, involved loads consolidated by Val-Baxt and CEI from a number of shippers referred to as LCL or LTL (less than full container or trailer loads) shipments.[9/]

In the earlier days of containerization, Val-Baxt used 7 or 8 foot so-called "Dravos" or "Dravo boxes." Somewhat larger containers were introduced by the early 1950's. (72a-73a, 794a-795a). From the beginning of this service, the maritime shipping companies had hoist equipment with which fully loaded

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8/ For example, CEI has handled such "one-shipper" straight loads for customers such as Playtex, IBM, Bargaintown Stores, and Loewengart Company. (74a.)

9/ Recognizing the specialized functions performed by Val-Baxt, the Federal Maritime Commission noted:

> Val-Baxt is a non-vessel-owning common carrier by water offering a door-to-door service to the public. Thus, it consolidates shipment trailers pursuant to a tariff ... which covers the ocean and inland transportation. This tariff is based on the commodity rates of Sea-Land and includes additional charges to cover the services between vessel and door. On shipments which it consolidates Valbaxt performs the function of a shipper vis-a-vis the ocean carriers operating between the United States and Puerto Rico. (Emphasis added.)

Hasman & Baxt, Inc., Valencia Baxt Express, Inc., 8 FMC 453, 454 (1965).

containers were placed directly from the pier aboard either straight or flatbed trucks or to be unloaded the trucks upon arrival at the pier for shipment to San Juan. (73a-74a.) The work of stuffing and stripping was done by Val-Baxt with teamsters[10/] and without ILA interference.

The formation of CEI in 1965 was the result of a difference among the owners of Val-Baxt as to the future focus of their business. Principal shareholders and chief operating officers Rodolfo Catinchi and Roy Jacobs were committed to continuing the mainland-Puerto Rican consolidation business, while Alphonso and Wallace Valencia were primarily concerned with the intra-island trucking business in Puerto Rico. (772a-774a.) An agreement was reached by which Catinchi and Jacobs would continue the entire consolidation portion of the business in a separate company--CEI.

All of the assets and liabilities relating to the consolidation business, including physical assets, customer lists, lease obligations, and tariffs, were assumed by CEI.[11/] The establishment of CEI as a corporate entity in 1965 did not affect the container operations that had been conducted

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10/ Val-Baxt (and subsequently CEI) had an agreement with U.S. Trucking Co. under which U.S. Trucking would provide the platform and personnel for various functions including the actual consolidation of containers and their delivery to the pier. Such personnel have always been members of Teamsters Local 807. (67a, 102a-103a, 785a.)

11/ In return, Catinchi and Jacobs surrendered all their stock in Val-Baxt. (780-785a.) See also 527a-548a.

by Val-Baxt. The New York-Puerto Rico container operations continued unaltered, at the same location, under the same tariff, supervised by the same individuals, serviced by the same employees in the same Teamsters Local 807, using the same shipping companies.[12/] The only difference was the name of the corporate entity.[13/]

Consolidation Tradition of Non-Longshoremen. The fact that CEI's predecessor, Val-Baxt, had established a tradition of consolidating containers with teamsters is not unusual. This experience does not differ from that of the other consolidators and freight forwarders. From the earliest years of consolidation, the truckmen rather than the longshoremen were primarily responsible for sorting and consolidation of maritime cargo. For example, truckmen would collect shipments for particular ports and deliver them to the

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12/ See note 10 supra. In August 1973, CEI and U.S. Trucking terminated their Agreement. Since then, CEI has employed members of Local 807 directly. (526a, 726a-727a.)

13/ The ALJ found that CEI was performing functions previously performed by Val-Baxt in substantially the same manner. Though making no finding as to successorship, regarding such a finding as unnecessary to the decision, the the ALJ stated without explanation that he doubted "the sufficiency of the evidence to warrant a finding of successorship." (152a.) The NLRB also found the successorship question unnecessary and made no finding on this issue. (186a n.6.) In their briefs before this Court, NYSA and ILA do not challenge CEI's successorship status. Since successorship is therefore not an issue between the parties before this Court, CEI is simply attaching hereto as Addendum B a portion of its brief below addressing this subject.

appropriate pier.[14/] Systematic consolidation of individual shipments took place in a variety of ways, but almost always at the direction of the truckmen. In some instances, truckmen would deliver miscellaneous cargo to various inland warehouses, subsequently consolidating such cargo into a single truckload for delivery to the pier. (65a, 71a-72a.) In addition, various packing houses would assemble a series of miscellaneous shipments into a single, consolidated lot and ship it on a single bill of lading to its destination port.[15/]

By the mid-1950's, the use of various types of containers to consolidate freight for maritime shipment was becoming well established, and the preparation of such cargo was performed off the docks by trucking companies and NVOCC's such as Val-Baxt, where such work was done by Teamsters and other employees not represented by the ILA.

As noted above, the first such containers were merely wooden boxes, which were eventually replaced by "Dravo" boxes

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14/ In instances where a sailing might involve more than one destination point, it was the truckmen who unloaded the cargo at the appropriate "port-mark" on the pier. In addition to grouping shipments for a particular sailing, truckmen also consolidated shipments while awaiting entry to the pier through ad hoc exchanges of cargo among truckmen, permitting them to deliver consolidated truckloads to a particular pier for a particular sailing. (63a-65a, 71a-72a.)

15/ The functions performed by freight forwarders or import-export truckmen was stated by the Federal Maritime Board in 1961. Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders, 6 FMC 327, 334-35 (1961). See also 63a-65a.

and then by the larger metal units which had to be hoisted aboard flatbed trucks for delivery to inland destinations. In the mid-'60's, Pan Atlantic Services, Inc. (now Sea-Land) introduced a new type of vessel designed to carry large containers. The containers differed from earlier cargo units in both size and design. As much as 20 to 40 feet long, the containers were, in effect, over-the-road truck trailers. These containers could be placed directly on tractor and chassis rigs as an actual part of the truck, driven on and off the docks, and delivered to inland consignees with no further handling. The containers were loaded onto and unloaded from the ship by longshoremen without stripping and restuffing. The "cargo" of this vessel (i.e., the entity in terms of which the carrier's cargo rate tariffs were based) was the container. (846a-850a, Addendum A.)

The advent and growth of these large trailer/containers immediately increased the efficiency of teamsters as well as longshoremen. For example, these large containers obviated the need for the truckmen to pack or unpack his freight onto or from the so-called "port-mark" of the pier. Containerization, among other advancing technologies, was to provide labor saving benefits both as to longshoremen and as to truckers. This fact, apparent in the early stages of containerization, did not occasion the types of claims raised for the first time here--namely that ILA may force to the

docks all container consolidation work in the New York Port area to be performed by longshoremen. These claims are inconsistent with previous understandings, policies, and practices.

For example, in 1955, Thomas Gleason, now President of the ILA and then its Director of Organization, expressly recognized Teamster jurisdiction over containers. Testifying before a Committee of the U.S. House of Representatives, Mr. Gleason was asked his position on the new ships built especially for the large trailer/container. His response was that the "International Longshoremen are not interested too much in that because that belongs to the International Brotherhood of Teamsters."[16/]

In the earliest stages of containerization, NYSA also recognized the tradition of consolidating containers off the docks. This is clearly reflected in the Federal Maritime Board tariffs filed by the NYSA member shipping companies handling containers in the New York-Puerto Rico trade prior to 1959.[17/] These official documents show that off pier consolidation work was not only allowed, but actually was mandatory in order to qualify for the tariff rate under

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16/ Hearings on H.R. 5734 Before the House Comm. on Merchant Marine and Fisheries, 84th Cong., 1st Sess., at 835 (1955).

17/ See, e.g., tariffs in Addendum A.

which consolidated containers have been and are shipped--namely, Freight-All-Kinds.[18/]

Thus, prior to 1959, the ocean carriers recognized that an NVOCC such as Val-Baxt and CEI has to operate away from the pier at both origin and destination in order to

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18/ In Pan-Atlantic's July 16, 1958 tariff, for example, the following rules applied to Freight-All-Kinds shipments.

> FREIGHT ALL KINDS (except as noted), in mixed trailer loads, when loaded in carrier's trailers by shipper and unloaded from carrier's trailer by consignee moving under a shipper's load and count bill of lading, subject to Notes 1, ... 5, ... 9.
>
> * * *
>
> Note 1: Freight must consist only of consolidated less-than-truckload shipments ....
>
> * * *
>
> Note 5: ... [T]he following provisions will apply:
>
> At origin: Trailers shall be removed from the terminal of carrier [in Puerto Rico] by the shipper for loading at shipper's expense and risk.
>
> At destination: Trailers shall be removed from the terminal of the carrier at Port Newark, N.J. by the consignee for unloading at consignee's expense and risk.
>
> * * *
>
> Note 9: The carrier's liability will be limited to $500.00 per trailer ....

FMB-F No. 2. Homeward Freight Tariff No. 4, pp. 37-38 (see Addendum A). The limitation on liability established in Note 9 was acceptable to the shipper-consolidator because the containers were sealed, and not subject to either rehandling, loss, or pilferage. See also 1107a-1108a.

qualify for the Freight-All-Kinds rate. No meaningful change in this tariff was filed until 1973, when the events leading to this case began. (1105a-1107a.)[19/]

The 1959 ILA-NYSA Agreement. By 1959, it was clear that non-ILA workers already had a tradition of stuffing and stripping all types of containers off the pier. In those circumstances, it is not surprising that, in the 1959 ILA-NYSA collective bargaining agreement, ILA recognized the practice of container stuffing and stripping outside the pier by non-ILA employees. ILA sought and obtained in return monetary concessions to meet the problem of advancing technologies including containerization.

The first reference to containers in an ILA-NYSA collective bargaining agreement, Section 8 of the 1959 contract (208a-209a), stated as follows (emphasis added):

> 8. Containers:--Dravo Size or Larger
>
> (a) Any employer shall have the right to use any and all types of containers without restriction or stripping by the union.
>
> (b) The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached, shall submit to arbitration ... the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor ....

19/ A 1973 tariff change to charge the $1,000 fine contained in the Rules on Containers has been found by an administrative judge to be discriminatory and unlawful under the Shipping Act. Puerto Rico Maritime Shipping Ass'n, Nos. 73-17, 74-40 (FMC, October 9, 1975) (Morgan, ALJ).

> (c) Any work performed in connection with the loading and discharging of containers for employer members of the NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

The clear language of § 8(a) states that there was to be no ILA restriction on the handling of containers, except that royalty payments would be paid on containers not originally handled (i.e., stuffed or stripped) by the ILA (the quid pro quo for § 8(a)). As discussed in detail below, NYSA and ILA contrive an argument that § 8(a) applied only to "shipper loads" (80% of the container traffic) but did not apply to consolidated containers. However, even if § 8(a) of the collective bargaining agreement were somehow viewed as open to a possible interpretation authorizing ILA stripping and restuffing of CEI containers, the telling and dispositive fact is that during the entire term of that collective bargaining agreement, as the ALJ and Board found, the containers of Val-Baxt, CEI and Twin were not stripped, restuffed or otherwise interfered with by ILA.

ILA Efforts to Acquire Container Work: Pre-1968 Incidents. Perhaps because of the continued growth of the use of containers, the ILA did initiate occasional threats and harassment against Val-Baxt and CEI, notwithstanding the

plain language of the 1959 contract.[20/] As a result of such incidents, Joseph Mangan, President of Teamsters Local 807, met on two occasions with representatives of the ILA. On both occasions, all parties agreed that containerization generally was reducing work opportunities for the membership of both unions. (68a-70a.) It was also agreed that the ILA had jurisdiction over any work performed within the pier compound and that the International Brotherhood of Teamsters ("IBT") had jurisdiction over consolidation outside the compound. (69a.) The original jurisdictional understanding between the IBT and the ILA was affirmed in a telegram from the President of the IBT, Frank Fitzsimmons:

> In response to your inquiry it is the understanding between the ILA and the IBT regarding containerization that the loading and unloading of LTL containers within a compound comes within the jurisdiction of ILA. When LTL containers are loaded or unloaded outside the compound that work falls within the traditional jurisdiction of the IBT. (113a.)

The reply affidavit submitted by ILA President Gleason supported the contentions of Mr. Fitzsimmons, as follows:

> That portion of the telegram which refers to the IBT jurisdiction over the loading or unloading of LTL containers outside of the compound does not in any way contradict my understanding with Mr. O'Rourke or with Messrs.

20/ In 1962, ILA placed a picket line at the off pier facility where Val-Baxt containers were stuffed and stripped. ILA demanded that the work at the facility be performed by ILA members. The picket was subsequently removed and shipments continued without ILA interference. (67a-68a, 103a, 107a-110a.)

> Hoffa or Fitzsimmons inasmuch as the shipping companies and stevedores, but not the consolidators, have been and are under an obligation to have LTL containers stuffed and stripped within the compound. (120a emphasis; added.)

The 1968 "Rules on Containers". As the bargaining period for the 1968 contract approached, NYSA representatives prepared a memorandum in which they explicitly indicated that, in order to protect containerization as a whole and, presumably, avoid a strike, they were "willing to meet this problem by creating an exception to the present contractual rights of employers to use any and all type of containers without restriction or stripping by the Union."[21/] Thus, for the first time, the 1968 contract resulted in specific rules requiring, in effect, that all consolidation of LTL cargo be performed at ILA-manned waterfront facilities. (247a-250a.)

The Rules required that containers holding LTL shipments, originating or destined within a 50-mile radius of the port in which the container was either loaded aboard or discharged from a vessel, and whose contents were not beneficially owned by a single person, would be stripped and stuffed on pier by ILA deep-sea labor. Manifestly intended to acquire the work of consolidators, the Rules were inconsistent with the tariff

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21/ 892a-897a, 1017a-1019a, 1059a-1060a. See also "Factual Memorandum on Containerization under NYSA-ILA and CONASA-ILA Labor Agreements" appended to Gleason Affidavit submitted in conjunction with Answer of Respondent ILA to Petition for Injunction in CEI 10(1) Proceeding, at 17.

provisions for Freight-All-Kinds rates that require stuffing and stripping outside the pier. See pp. 16-17 supra. Nevertheless, the collective bargaining agreement provided that containers loaded aboard or discharged from vessels in violation of the Rules subjected the handling carrier to a fine of $250 (subsequently increased to $1,000 in 1973). (261a.)

Notwithstanding the 1968 contract, the Rules on Containers were not applied to containers shipped by established consolidators during the period 1969-1972.[22/] As the NLRB found, until 1973 containers loaded by CEI went through the Port of New York without interference.[23/]

Amendment and Enforcement of the Rules on Containers. By 1973, ILA decided to drive consolidators out of business by forcing all consolidation work within the New York Port area to the docks. At a meeting in Dublin in late January, 1973, between ILA and the Council of North American Shipping Associations (CONASA), which includes NYSA, restrictive new Rules on Containers were formally adopted as CONASA-ILA Container Committee Interpretive Bulletin No. 1 (the "Dublin Rules").

22/ See pp. 8-9 supra.

23/ See pp. 32-33 infra. In addition, it is interesting to note that not one ocean carrier in the commerce of the United States deemed it necessary to change its tariff provisions which made the stuffing and stripping away from the pier mandatory. See pp. 17-18 supra. This is persuasive evidence that the maritime carriers never intended to enforce the 1968 Rules on Containers against consolidators.

The Dublin Rules on Containers significantly provided that NYSA members could no longer supply containers to off pier consolidators. There was initial reluctance by some committee members to enforce the Dublin Rules against established consolidators such as CEI or Twin, but it was concluded that "all non-waterfront facilities must be closed down on or before March first."[24/] A notice listing 14 consolidation facilities was circulated among members of NYSA. The notice, dated April 13, 1973, stated that NYSA members were to refuse to supply containers to the listed consolidators. The list included the names and addresses of CEI and Twin. (524a-525a.)

Soon after the adoption of the Dublin Rules, CEI was informed by various officials of the three U.S.-Puerto Rican maritime carriers (Sea-Land, Seatrain, and TTT) that CEI containers would temporarily be subject to stripping and restuffing on the pier. Such rehandling began to occur in early February at Sea-Land, although a Sea-Land employee indicated to CEI that the problem would soon "blow over." (746a-747a.)

In late February and early March, however, officials of all three carriers indicated that CEI's containers would, after all, be subject to the Dublin Rules on Containers. On or about March 14, 1973, CEI was advised that Sea-Land would no longer provide containers to CEI. Later in March, CEI

24/ See minutes of Feb. 27, 1973 meeting, attached as an Exhibit to the Affidavit of Thomas Gleason Jr., supra note 21.

was advised that Seatrain would no longer accept containers from CEI, and a few days later, the President of Seatrain indicated that Seatrain would no longer make containers available to CEI. Although TTT continued to provide containers, such containers were to be stripped and restuffed in all instances at TTT's pier facility. (748a-754a; 760a-763a, 765a-767a.)

In April and May of 1973, Roy Jacobs, Vice President and Chief Operating Officer of CEI, negotiated with officials of Sea-Land, Seatrain and TTT in an attempt to find some means of minimizing the disruption of CEI's business. In each case, the condition set for CEI to continue consolidating LTL cargo without rehandling was CEI's agreement to move its operations to the waterfront and substitute deep-sea ILA labor for its teamster platform and driver personnel. (758a-760a, 765a-767a.) Finding this alternative economically unsound, CEI rejected such conditions, and its business continued to deteriorate. From an average of 27 containers shipped per week prior to February, 1973, volume declined to 7-8. (549a-551a, 1112a.)

Thus, the impact of the Rules on Containers was to reduce significantly CEI's volume of business. CEI was the target of the ILA's work acquisition sword, and could not effectively defend its operations. Even if CEI were to move its terminal beyond the 50-mile limit of the container rules, the ILA stripping and restuffing sanction would follow pursuant to the so-called evasion provision of the Rules. (513a.) By late May, 1973, CEI appeared to have only two alternatives:

(1) accept one of the various economically unsound proposals that it move its operations to a facility employing ILA deep-sea labor, or (2) go out of business immediately. The company filed formal charges under § 8(b)(4) and § 8(e) of the National Labor Relations Act on June 1, 1973, and thereby commenced the instant proceeding. The subsequent issuance of a preliminary injunction stayed the enforcement of the Rules on Containers pending the Board's determination.

SUMMARY OF ARGUMENT

The principal issue raised in this case is whether the Rules on Containers can be used by ILA to expand its work opportunities by reaching out to bring to the docks work which had been traditionally performed off the docks by consolidators with non-ILA labor. Upon review of the record, the NLRB found that the rules to be "work acquisition" rather than "work preservation." The factors prompting this conclusion were compelling. The Rules on Containers invaded the distinct and independent work tradition of non-ILA personnel (largely teamster). Teamsters have had a history of consolidating containers that predates or at least parallels any related work history of longshoremen. Aimed at acquiring the off pier consolidation work of CEI and similar companies, the Rules on Containers were secondary in intent and effect. Indeed, enforcement of the rules would mean the virtual demise of these long established consolidation businesses. Moreover, whatever hypothetical claim ILA

might have had to the work in question was quite clearly waived or abandoned by ILA by its 1959 collective bargaining agreement and its actions before and after the execution of that agreement.

ILA and NYSA rely upon a number of inconsistent factual contentions as basic to their argument. They also misconstrue and misapply the law which is not surprising since the thrust of the applicable precedents provides them no comfort. They rely quite vigorously on an antitrust case, International Container Transport Corp. v. NYSA, 426 F.2d 884 (2d Cir. 1970) [hereinafter cited as "ICTC"], in which the issue of whether the 1968 Rules on Containers were "work preservation" or "work acquisition" was not raised or contested. ILA and NYSA have failed to confront the fact that another Circuit and the NLRB have previously considered similar rules under similar circumstances and reached the same inescapable conclusion as in this case.

I. THE BOARD CORRECTLY DETERMINED THAT THE 1973 RULES ON CONTAINERS WERE AIMED AT WORK ACQUISITION, NOT WORK PRESERVATION.

A. The Rules of Containers Seek to Acquire Work Which Had Not Traditionally Been Performed by ILA Labor.

In National Woodwork Manufacturers' Association v. NLRB, 386 U.S. 612 (1967), the Supreme Court defined the reach of §§ 8(b)(4) and 8(e) of the NLRA. The Court concluded that, while work preservation objectives directed toward the primary

employer were lawful, activities that sought to acquire the work of neutral employees were secondary and unlawful. According to the Court, §§ 8(b)(4) and 8(e) were not intended to prohibit work preservation agreements, so long as "the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." If an agreement is used as a shield to protect existing unit work, it is "work preservation" and not forbidden. If, on the other hand, an agreement is used as a sword to acquire new work, then it is "work acquisition" and illegal under the act. Thus, the critical issue is the objective of the agreements and activities in operation.

The Court laid down a standard calling for consideration of "all the surrounding circumstances." The Court pointed to such circumstances as the history of labor relations, the economic personality of the industry, and the threat of displacement by the banned product or services. 386 U.S. at 644 n.38. The Court noted that "an actual dispute with the boycotted employer" is not required for the activity to fall within the prohibited category. Finally, the Court emphasized that the necessary determinations in each case might well involve difficult factual questions.

National Woodwork involved an attempt by carpenters, who had traditionally performed all detail work on doors, to continue doing so, precisely preserving their traditional

jurisdiction. The Supreme Court found the NLRB's decision that the agreement in question aimed at work preservation to be supported by substantial evidence. In the present case, the Board declared that the Rules on Containers had an unlawful secondary purpose and effect--namely, an attempt by ILA to reach beyond its traditional work and to claim work which longshoremen had never performed. NYSA and ILA suggest that the decision of the NLRB below contravenes National Woodwork. No such conflict exists. In fact, quite to the contrary, the decision in this case conforms to and properly applies the guidelines of National Woodwork. The record below contains substantial, indeed overwhelming, evidence of the secondary nature on the Rules on Containers.

Employees legitimately cannot "preserve for themselves" work which they have never performed.[25/] Any union effort directed against work which had not actually been performed by the unit in question must by definition be secondary. Similarly, employees cannot "reacquire" work which was never theirs.[26/] No surrounding circumstances can possibly justify such activity under the NLRA.

25/ See, e.g., Asbetos Workers Local 8 (Preferred Metal Products Co.), 173 NLRB 330, 69 LRRM 1344 (1968).

26/ In these circumstances, the "work reacquisition" principle of American Boiler Manufacturers Association v. NLRB, 404 F.2d 547 (8th Cir. 1968) is inapplicable.

The record and the facts, as found by the NLRB, show an uninterrupted tradition of container work and consolidation off the piers dating back at least to 1949, and a tradition of non-longshore involvement in the cargo sorting and preparation process for many years prior to that. (61a-67a, 71a-76a.) Val-Baxt, CEI's predecessor, began its New York-Puerto Rico NVOCC operations in 1949, consolidating mixed freight into containers and shipping them under a single bill of lading. Val-Baxt and CEI have over the years received freight at their own warehouse, stuffed and stripped containers, and distributed the freight to the ultimate consignees. See pp. 10-13 supra.

As early as 1949, NVOCC's and consolidators had routinely used non-ILA labor, mostly teamsters, to perform freight consolidation and container work. In 1955, ILA President (then Director of Organization) Thomas W. Gleason testified before a congressional committee that the ILA recognized Teamster jurisdiction over container freight work. See p. 16 supra.

Val-Baxt's consolidation operations were continued essentially unchanged through CEI, the direct heir to the facilities, operations, and employment relationships begun by Val-Baxt in 1949. Thus, for 26 years, CEI has dealt with the maritime shipping companies as an independent consolidator and freight forwarder, performing freight handling

services for its customers at off-pier facilities and with teamster employees. See pp. 11-13 supra.

These facts, more fully set forth in the Statement of the Case, clearly establish a non-ILA tradition of freight consolidation for maritime shipment in containers which substantially predates any ILA tradition in the performance of any arguably related work.

In response to the independent history of off-pier stuffing and stripping by non-ILA personnel, NYSA and ILA assert three seemingly inconsistent factual contentions. First, they argue that over the last fifteen years, the policy and practice had been that containers, originally stuffed by CEI and other consolidators, were to be stripped and restuffed at the piers by ILA labor. Next they argue that, even if such stripping and restuffing were not the practice, sporadic incidents of such practices constitute a sufficient notice of a claim to that work. Lastly, ILA and NYSA contend that the history of longshore unitizing and containerizing of break bulk cargo brought directly to the piers provides the basis for claiming the work in question. Each of these contentions is factually unsupported and legally insufficient.

The initial NYSA-ILA contention, of a continuous fifteen year history of a make-work practice of stripping and restuffing consolidated containers at the pier with ILA

deep-sea labor, presents a direct factual issue. This contention was the focal point of NYSA/ILA's case at the hearings below. Both the ALJ and the Board found against them on the basis of substantial evidence. As the ALJ stated, with respect to CEI's operations prior to 1973:

> [P]ersuasive and cogent evidence was adduced ... to show that with a few acknowledged exceptions Consolidated's [CEI's] containerized shipments over the years went through the Port of New York and were loaded for shipment without interference by ILA in the way of stripping or restuffing.
>
> * * * *
>
> I conclude and find that the preponderance of the evidence, testimonial and documentary, establishes that, with a few exceptions noted hereunder, Consolidated containers passed over the docks without rehandling by longshoremen. 27/

The Board similarly dismissed the petitioners' claims to continuous stuffing and stripping of consolidated containers:

> Since 1959, and until the enforcement of the Dublin Supplement in 1973 which gave rise to this proceeding, ... with few exceptions, ILA has loaded such containers without stripping and restuffing. ... The limited stripping and restuffing performed by ILA at times coinciding with contract negotiations reveals, at most, attempts on the part of ILA to bolster its bargaining position. 28/

27/ 154a-155a. The ALJ and the NLRB also rejected on the evidence ILA's argument that this failure to stuff and restuff consolidated containers was the result of deceptive practices on the part of CEI to keep ILA unaware of what was going on. The ALJ considered this argument "not, on all the evidence of record, very persuasive." Id.

28/ (200a; footnotes omitted; emphasis added.) See 190a-191a.

NYSA and ILA did not produce a single witness who had seen any specific stripping and restuffing of a consolidated container. In contrast, numerous statements by the people actually involved in moving containers to the piers and receiving them in San Juan, and well-founded documentary and circumstantial evidence established that, with few exceptions, CEI and Twin containers were not stripped and restuffed at the pier.

An entire brief could deal with the extensive and persuasive evidence submitted by CEI and Twin on this issue. Suffice it to note here that ILA and NYSA could not establish any practice prior to 1973 under which containers of Twin and CEI or any other consolidators had been stripped and restuffed at the pier. CEI and Twin, however, were able to show that their containers were placed on ships when they were delivered a short time prior to actual loading, rendering stripping and restuffing practically impossible. CEI and Twin were able to show that their container seals remained unbroken during transit and that, prior to 1973, they did not confront the delays, breakages, losses and overages that would necessarily have occurred if the practice had been to strip and restuff their containers at the pier.[29/] Moreover, once the practice of stripping and

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29/ Particularly instructive documentary evidence was submitted in the form of an internal NYSA memorandum confirming that consolidated containers passed the piers without stripping and restuffing. Referring to a container consolidated by Twin, the memorandum, dated November 10, 1966, stated:

(Footnote continued)

restuffing consolidated containers began with the enforcement of the 1973 Rules on Containers, the impact on the businesses of CEI and Twin was immediate and disastrous. See pp. 23-25 supra. The companies surely could not have functioned as they did, if the traditional practice of ILA had been to stuff and restuff CEI and Twin containers. In brief, the record as a whole supports and, in fact, compels the conclusion reached by the ALJ and the NLRB that prior to 1973 CEI and Twin containers were not subject to stripping and restuffing.

ILA and NYSA next argue that, even absent a practice, there were sporadic occasions upon which longshoremen undertook to strip and restuff consolidated containers. NYSA and ILA assert that these incidents establish a work "claim" sufficient to justify an effort to acquire all consolidation work. The incidents, which the Board found to have occurred in connection with ILA-NYSA contract negotiations, were aimed more at harrassing the maritime carriers than at seriously claiming

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(Footnote 29 continued)

> Under the contract, this container should go through without stripping subject only to the appropriate royalty payment, since there is one shipper, one bill of lading, one consignee; in the other words, a shipper's load. (423a.)

When CEI and Twin consolidate and ship containers they are the shipper and consignee under one bill of lading.

the work in question.[30] In any event, they are inadequate to support a showing of prior work history in order to justify the ILA's efforts as "work preservation."

In Kennedy v. Sheet Metal Workers Int'l Ass'n Local 108, 289 F. Supp. 65 (C.D. Cal. 1968), a district court granted a Section 10(l) injunction against union activity which sought to require on-site fabrication of round pipe. The court relied heavily upon the fact that most employers in the relevant area normally and regularly purchased their requirements of round pipe from mass-production manufacturers, and that the employees in the unit had not customarily and traditionally performed the claimed work.

Similarly, in Local 98, Sheet Metal Workers Int'l Ass'n v. NLRB, 433 F.2d 1189, 1195 (D.C. Cir. 1970), the court, affirming the NLRB's finding of a section 8(e) violation, placed strong emphasis on the fact that unit employees had not "customarily and traditionally" performed the work in question. Although the unit had done the work on rare occasions in the past, the court enforced the Board's decision that the unit could not legally claim such work.[31]

30/ (199a-200a). Such incidents occurred once in the 1969-1972 period and sporadically over a period of a few months in 1971, involving 20-25 containers. (740a-742a.)

31/ See also Local 141, Sheet Metal Workers Int'l Ass'n (Cincinnati Sheet Metal & Roofing Co.), 174 NLRB 843, 849-850, 70 LRRM 1324 (1969), enforced, 425 F.2d 730 (6th Cir. 1970); Local 26, Sheet Metal Workers Int'l Ass'n (Reno Employers Council), 168 NLRB 893, 896-7, 67 LRRM 1130 (1967).

> From ... the record as a whole, it is clear that the on-pier stripping and stuffing performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their off-pier premises. (197a.)

The thrust of NYSA/ILA's position is that the stuffing and stripping of containers is "preparation" of the cargo for placement in the vessel and as such falls within the traditional or the "fairly claimable" work of the ILA of "unitizing" or preparing cargo for shipment. But, while cargo handling <u>on the docks</u> has generally been longshoremen's work, this fact does not give the longshoremen the right to every form of cargo handling. The process of cargo preparation and shipment is a continuum of packaging and assembly, beginning with manufacture of goods and ending only in ultimate consumption or use. Under the NYSA/ILA reasoning, any and all packaging or assembly may be claimed by longshoremen. The stuffing and unstuffing of containers is no more a form of "cargo preparation," however, than is the canning of goods or the crating of general merchandise.

On the facts clearly established in the record, the ILA can have no claim to the exclusive right to unitize freight, because that process has never been primarily an on pier phenomenon. The record is replete with examples of early teamster involvement with predecessors to the modern container. As long ago as the 1920's, teamsters were collecting and consolidating large pieces of freight in trucks which were still horse-drawn.

Thus, a mere showing that consolidated containers were occasionally rehandled on the docks by ILA personnel cannot justify the ILA's efforts to obtain all such work for its members under the guise of "work preservation" or "reacquisition."

B. The Stuffing and Stripping of Consolidated Containers Is Not Claimable By ILA.

Confronted with an indisputable history of non-ILA consolidation, NYSA and ILA focus on yet another contention. They point out that there is a history of longshoremen "unitizing" or otherwise preparing cargo for shipment. They also note that traditionally longshoremen have received break bulk (or loose) cargo delivered to the docks to be placed directly into the hold of ships or into containers. ILA and NYSA contend that this history of related or similar work provides the legal basis to acquire as fairly claimable all the container consolidation work heretofore done off the docks.

Although finding the evidence of any stuffing or stripping of containers by ILA "sparse" (164a n.8) the ALJ apparently accepted the theory that a history of "unitizing" cargo provided a basis for claiming the work of off pier consolidation. (168a-170a.) Rejecting this contrived theory, the NLRB placed the longshore tradition in its correct perspective and concluded:

Smaller pieces of valuable cargo were placed in cribs by these same teamsters. (61a-65a, 71a-72a.)

By the time Val-Baxt began its operations after World War II, wooden containers and boxes were in widespread use and metal Dravo boxes were appearing on the scene. The type of packing which teamster and other employees of consolidators conducted off pier using these early containers obviously more nearly resembles the work at issue than did the banding, tying, and slinging typically performed by longshoremen. As the Board has pointed out in the Cal Cartage case, supra, "it may well be, as ILWU contends, that the modern container is in effect, part of a ship.

But it is also true that the same container is part of a truck or perhaps a train." 208 NLRB at 996, 85 LRRM at 1302.

NYSA and ILA thus totally miss the point in their argument that container stuffing and stripping is a form of preparing or unitizing cargo for shipment, that the traditional work of longshoremen has included certain aspects of cargo preparation, and that, therefore, all stuffing and stripping containers may be deemed "fairly claimable" longshore work. Container consolidation has historically been performed off the docks by non-longshoremen and cargo has arrived at the docks--the location of longshore jurisdiction--prepared for transit to some extent. The fact is, simply, that while cargo handling on pier has been longshoremen's work, not all cargo preparation--or unitization--has been done by longshoremen.

Moreover, while longshoremen have loaded and unloaded all ships, they have never dictated, or attempted to dictate, the nature of the cargo. Cargo handled by ILA labor, whatever its form or size, moved under a bill of lading, and the ILA never sought to pack or unpack the contents of parcels moving under a bill of lading until the enforcement of the Rules on Containers in 1973. The identity of the "cargo" handled by longshoremen has always been established by the tariffs of the maritime carriers. See tariffs attached in Addendum A.[32/]

CEI and other NVOCC's ship under a single bill of lading. Thus, when arriving a the dock, the "cargo" is the container, and CEI does not challenge the jurisdiction of the ILA to assemble, load and unload maritime cargo. Moreover, the tariff rate paid by CEI to the maritime carriers was a flat rate per container, under shipping rates on the commodity being shipped. Under the Freight-All-Kinds tariff, the container was the cargo.

The ILA has no right to tamper with the contents of cargo arriving at the docks. To allow such a claim

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32/ The "sparse" evidence in the record which indicates that ILA members stuffed and stripped some containers on docks must be understood to have been performed in relation to cargo entrusted to NYSA members in loose or break-bulk form, shipped under individual bills of lading and pursuant to general cargo tariff provisions, which the maritime carrier decided to ship in containers for reasons of convenience or necessity. In a fully containerized ship, break-bulk cargo cannot be accommodated and must be containerized.

would logically allow similar claims to intrude upon other forms of packaging, dependent solely upon the union's selection of which commodity-cargoes it would demand, or which other union's work it wished to capture. This was obviously the Board's point in Cal Cartage, supra, where it noted:

> The work of stuffing containers ... does not change its essential character because it is performed by shippers rather than trucking company employees. ... While the ILWU does not now seek all container work, the logic of its position is that it is legally entitled to all such work, without regard to the identity of the competing employees. 208 NLRB at 996, 85 LRRM at 1302.

Similarly unpersuasive is the contention that if ILA members have performed some stripping and stuffing of containers, ILA may legitimately demand all of such work. As noted above, the record contained "sparse" evidence that ILA members containerized break bulk cargo brought to the docks. From this contention, ILA and NYSA assert that all the container consolidation work heretofore performed off pier by teamsters is claimable and, thus, may be acquired by ILA. This "some begets all" theory of job entitlement has never been adopted by Congress or the courts. A similar argument was rejected by this Court in NLRB v. National Maritime Union, 486 F.2d 907 (2d Cir. 1973), cert. denied, 410 U.S. 970 (1970), and is surely inconsistent with the "work preservation" rather than "work acquisition" thrust of National Woodwork. As Justice Harlan noted in an accompanying memorandum in National Woodwork:

> This, then, is not a case of union seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs. 386 U.S. at 648.

The "fairly claimable" principle, first referred to by the D.C. Circuit, is essentially a different verbal formulation of the work preservation principal and does not alter the analytical framework established in National Woodwork.[33/] Recognizing this fact, the D.C. Circuit has stated that the question of whether the "fairly claimable" principle applies involves "in National Woodwork terms, in which jobs does the union have a valid work preservation interest." Sheet Metal Workers Int'l Ass'n v. NLRB, 498 F.2d 687, 693 (D.C. Cir. 1974). Accordingly, the "fairly claimable" principle does not exempt secondary "work acquisition" such as presented in this case. Significantly, as discussed below, the D.C. Circuit has found similar rules unlawful in Cal Cartage, a case that is directly applicable here.

The work of longshoremen is loading and unloading ships. Even if longshoremen have also performed incidental stuffing and stripping functions, the ILA has no fair claim to the work here at issue, which had traditionally been

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33/ The phrase apparently was first used in Meat and Highway Drivers Union v. NLRB, 335 F.2d 709, 713 (D.C. Cir. 1964), in a case involving "work recapture" and not an attempt to acquire work that the unit never performed.

performed by non-longshoremen. As the Board held in Local 282, IBT (D. Fortunato), 197 NLRB 673, 80 LRRM 1632 (1972), work does not become "fairly claimable" merely because it is similar to work which is acknowledged to be the traditional work of the unit:

> The fact that the driving of one truck may well be similar to, and require like skills as, the driving of any other truck does not persuade us that all driving work is therefore 'fairly claimable' by a unit of drivers. We are unable to find that the circuit court's discussion in Wilson & Co. ... ever intended such a result, particularly where, as here, the clause seeks protection of work historically performed by employees in other work units. (Emphasis added.) 34/

To hold that the work sought by the ILA through the Rules on Containers was "fairly claimable," this Court would have to ignore the work tradition of those employees to whom containers are "part of a truck," rather than part of a ship; sanction the right of the ILA to tamper with the contents and packaging of cargo; and, in so doing, permit the expansion of

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34/ 197 NLRB at 678, 80 LRRM at 1637-38, citing Meat & Highway Drivers, supra. See also Teamsters Local 216 (Bigge Drayage Co., 198 NLRB No. 130, 81 LRRM 1113 (1972). Even the container work which "sparse" evidence indicates was performed by the ILA, was different than the specialized work done by CEI and other consolidators. CEI's business has been to provide expedited, door-to-door service between New York and Puerto Rico. The containers used for shipment, which were both maritime cargo and over-the-road trucks, had to be stuffed in a manner which was not only safe for both modes of transport but also which allowed efficient delivery to the beneficial owners with stripping. The actual consolidation function involved proper ordering, spacing, weight placement, and other functions which were not part of the work done by longshoremen.

secondary work acquisition to new and unwarranted levels. The work in issue is not that which ILA now performs, but that which it wishes to take away from teamsters by relocation to the piers. As the Board noted, the NYSA-ILA position in this regard would support a claim "to all container work" without regard to other established work traditions.

II. THE NLRB's DECISION COMPORTS WITH THE LEGISLATIVE PURPOSE OF PROSCRIBING MANIFESTLY SECONDARY ACTIVITIES.

ILA and NYSA assert that the Rules on Containers are the result of direct disputes between the union and its employers. From this contention, they argue that the rules are primary, and not secondary, in nature. See, e.g., NYSA Brief at 28-29. This position ignores the manifest objective and effect of the Rules, as well as the pertinent legal considerations.

The present situation is precisely one which Congress addressed in enacting Section 8(e) and revising Section 8(b)(4) of the National Labor Relations Act. Congress especially wished to prevent a union from exercising its monopoly power in such a way as to enable it, in the guise of a labor bargaining contract, to reach out and acquire the work of other employee units.[35/] This was precisely what the ILA was attempting

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35/ See S. Rep. No. 187, 86th Cong., 1st Sess. 78-80.

through the Dublin Rules. Using its "bottleneck" power over the New York docks, the ILA negotiated a provision in which the primary employer agreed not to handle the products of or to cease doing business with a third party employer, namely CEI, Twin, and other established consolidators.[36/]

The heart of the 1973 Dublin Rules is the provision that prevents carriers from supplying containers to any "consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo ... including a forwarder who is either a consolidator or a distributor." (522a.) To hammer the point home the Rules additionally provided for a list of such consolidators to be maintained. (522a.)

At the time of the adoption of the Dublin Rules, both NYSA and ILA knew at whom the rules were aimed. Initially there was some reluctance by certain Container Committee members to enforce the Dublin Rules against CEI and Twin. However, it was agreed that "all non-waterfront facilities must be closed down on or before March first [1973]."[37/] The target date was not met; even so, but for the timely intervention of injunctive

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36/ A. Cox, The Landrum Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 272 (1959); G. Farmer, The Status and Application of the Secondary Boycott and Hot Cargo Provisions, 48 Geo. L.J. 327, 333, 335 (1959).

37/ The slow but increasing process of bringing the Rules into effect against CEI is detailed supra, pp. 23-25. See also the minutes of a February 27, 1973 committee meeting, supra note 21.

proceedings the operation would have been successful and the consolidators would have died.

On April 13, 1973, a further effort was made to ensure that off-pier consolidators would be choked off. Pursuant to the Interpretive Bulletin, the NYSA-ILA Contract Board issued a notice setting forth the consolidators to whom containers must not be supplied. The notice warned:

> Carriers have been assessed liquidated damages for violations of the Rules on Containers on containers stuffed or stripped at the below-listed facilities. (524a.)

Both CEI and Twin were listed.

So predatory were the Rules on Containers, and so narrowly aimed at destroying off pier consolidators, that the draftsmen even provided that if the consolidators moved beyond the 50-mile radius of the Port of New York, the Rules would follow and continue to apply to them. (248a.) No clearer demonstration of the determination of ILA to drive the consolidators out of business could be adduced.

The roots and motivation of the ILA and NYSA are not difficult to discover. In the ILA's case, the source is the union's ambition to extend its work opportunities generally. This ambition has previously manifested itself in historic conflicts with the Tamsters.

Aspects of this conflict, including several incidents involving CEI, have been detailed in the Statement of

the Case, supra, pp. 15-21. As a result of such incidents, Joseph Mangan, President of Teamster Local 807, met with ILA officials both in New York and Washington. Despite apparent agreement by the parties that technological advances had affected the work opportunities of both teamsters and longshoremen, and that neither union should attempt to expand its traditional jurisdiction at the other's expense, the longshoremen persisted in aggressive claims. (67a-70a.) This pattern--an expansionist attempt to seize teamster work jurisdiction while denying any secondary boycott intention--was repeated by the ILA with the issuance of the Dublin Rules.

On the part of NYSA, the record reflects motivations for the adoption of the Dublin Rules that are quite clearly unrelated to work preservation. In this regard, it is important to note that the voting structure of NYSA was reorganized in 1971. Prior to that time, the individual maritime carriers constituted the voting membership while stevedore companies participated as associate members. Under the new scheme, the carriers became associates and the stevedore firms became the voting members.[38/]

The implications of this change are clear. Carriers which get the container business of consolidators receive

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38/ These circumstances are quite different than had existed at the time the ICTC case developed. See pp. 57-59 infra.

income for the shipment of the container on the designated voyage, no matter who stuffs and strips the containers. Stevedore companies, as potential handlers of consolidated cargo in the first instance, regard consolidators as competitors[39/] and would benefit from the end of off pier consolidation.

Another factor serving to explain the promulgation of the Dublin Rules was the growing financial burden of the Guaranteed Annual Income (GAI) funds. In bargaining with NYSA in 1958-1959, the ILA had demanded and obtained provisions for royalty payments in return for the union's waiver of any claim to restrict or strip containers stuffed or stripped away from the pier.[40/] In 1964, NYSA had further agreed to maintain a guaranteed annual income for each deep-sea longshoreman in the Port. By 1973, the NYSA's obligations had increased to a guaranteed annual payment of $16,500 to each longshoreman. In these circumstances, pressures were being brought to bear on the NYSA and its members which they had not experienced in the past. It was clearly for very pragmatic reasons that in October of 1972, acquisition of the stripping and restuffing of all consolidated cargo became a major NYSA goal. (879a.)

39/ The President of NYSA, a former stevedore company employee, testified that containers stuffed by consolidators and loaded aboard ship without rehandling constituted a financial detriment to the stevedore companies. (898a.)

40/ 208a. See Cal Cartage, supra, for similar West Coast agreements, between the ILWU and the Pacific Maritime Association.

All of the above factors reveal undoubted secondary purposes on the part of ILA and NYSA in concluding the agreements that led to the 1973 Dublin Rules--purposes that are clearly illegal under the NLRA.

III. ILA FAILS TO DEMONSTRATE ANY DISPLACEMENT OF UNIT EMPLOYEES IN SUPPORT OF ITS WORK PRESERVATION CLAIM.

If ILA and NYSA were to prevail, there would be more work opportunities for present and future ILA members. This fact, however, cannot justify the imposition of the Dublin Rules and the consequent destruction of CEI, and Twin, and other consolidators, with loss of work opportunities to their employees. Obviously, any work acquisition clauses opens the way for additional work for the employee unit which is able to bargain for such a provision.

In National Woodwork the Supreme Court listed as one of the "surrounding circumstances" to be examined "the threat of displacement by the banned product or services." 386 U.S. at 744 n.38. ILA has failed to establish any instance where longshoremen have lost their jobs because of the off pier stuffing and stripping of consolidated containers. Its apparent theory is that general technological labor saving advances in the industry justify the boycott here.

The decision of this Court in National Maritime Union, supra, is instructive on this point. In that case, a key circumstance relied upon by this Court in enforcing the NLRB's

finding of a Section 8(e) violation was that "the beneficiaries of the union's clause will not be those members now employed on the vessel, but the union as a whole." 486 F.2d at 914. The NMU's contention that the bargaining unit could include all "seaman who may in the future be referred from the NMU hiring hall" to the employer, was rejected in light of the fact that no particular employees' jobs would be preserved by the contract clause. Id.

Technological advances may have decreased the overall number of job opportunities in many traditional areas of cargo handling work represented by both the longshoremen and the teamsters. What the ILA cannot show, and what it does not attempt to show, is that particular jobs on pier have been or will be lost as a result of the activities of off pier consolidators such as CEI and Twin.

NYSA, at the conclusion of its brief, claims that "some 2,500 longshoremen would lose their work on LTL and consolidated cargo if the NLRB decision is upheld." NYSA Brief at 50. Although NYSA fails to provide any substantiation for such a figure, it apparently emanates from the calculation attempted by Captain Haynes of NYSA at the hearings below. (1023a.) That calculation was, of course, based on the assumption that longshoremen were then engaged in stripping and restuffing of all consolidated containers moving across the piers. Captain Haynes himself never saw any such stuffing and stripping

performed on the pier. (1052a-1053a.) ILA and NYSA themselves seemingly have retreated from their claims as the case has progressed. Moreover, the ALJ and the Board specifically found that no such stripping and restuffing occurred. Thus, Haynes' calculation has no evidentiary weight whatsoever.

In this connection, it is worth noting the testimony by an experienced maritime carrier executive that a carrier such as Seatrain never had a dockside LTL station during the pre-1973 period, did not do any stuffing and stripping of consolidated containers, and therefore could not have been losing work opportunities for its ILA employees to off-pier consolidators.[41/]

Respondents' Exhibit R-12 (285a), repeatedly cited by petitioners as proof of the effect of consolidated containers on the work opportunities of longshoremen in the Port of New York, is similarly unconvincing. A decline in the total number of employees is matched by a large expansion in the hours worked per employee, from just over 900 hours in 1951 to 1450 in 1961, and to over 1750 in 1971.

To the extent that work efficiencies for longshoremen have increased over the years--as they also have for

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41/ 1027a-1030a. NYSA and ILA have provided asserted excuses as to why Consolidated Containers were not stripped or restuffed--excuses found to be "unpersuasive." (154a-155a.) See also 960a-967a, indicating extremely limited stuffing and stripping operations at Sea-Land.

teamsters--these changes are the result of a number of technological innovations ranging from containers to giant cranes, specially designed cargo vessels, and competition from air carriers, buses, inland barges, and pipelines. New means of carrying various products and commodities--such as sugar, liquids, paper, and palletized consumer goods--have cut into traditional cargo handling work in the same way that containers have. Moreover, a persuasive case exists that containers have so revitalized the mainland-Puerto Rico shipping that the direct short term and long term benefits to longshoremen have far outweighed its problems. Labor efficiency has increased but so has the tonnage.

For the most part, American labor organizations have recognized that some technological change is inevitable and in the long term interests of their members as wage-earners, consumers, and citizens. ILA has made the best deal that it could with the oncoming technological changes, securing a guaranteed wage for its members. Now, however, ILA seeks an alternative course: an illegal expansion into other workers' jobs by way of work acquisition.

IV. ILA WAIVED OR ABANDONED WHATEVER CLAIM IT MAY HAVE HAD TO STUFFING AND STRIPPING CONTAINERS OF CONSOLIDATORS.

Not only does the record in this case reveal the existence of a strong independent tradition of stuffing and

stripping containers on the part of teamsters working at off pier consolidation facilities, but it also establishes that the ILA waived or abandoned whatever hypothetical claim it might have had to this work. The NLRB found that this abandonment was signalized and confirmed in Section 8 of the ILA-NYSA Collective Bargaining Agreement of 1959.

Section 8 of the 1959 agreement, continued in the the 1964 agreement, delineated the respective rights and duties of union and employers with respect to all containers. Though ILA and NYSA had much to say about this agreement in their briefs, they understandably failed to repeat the text of this provision. (208a-209a.) First, and most important, clause (a) provided for the right of any employer "to use any and all type of containers without restriction or stripping by the union." Second, as a quid pro quo, the NYSA agreed to pay a royalty on "containers loaded or unloaded away from the pier by non-ILA labor" (clause (b)) and that the ILA would perform "loading and discharging" work on containers at longshore rates, when such work was done directly by or on behalf of NYSA members (clause (c)).

It could not be more clearly established, in plain language used in a labor contract, that the ILA bargained away any claim to the stuffing and stripping of containers passing over the pier in return for royalty payments on each container. 42/

42/ The royalty payments were later increased and a Guaranteed Annual Income (GAI) introduced in 1964. See p. 46 supra.

The only exception was to be those containers packed on behalf of or under contract to the maritime cargo carriers.[43/]

NYSA asserts that the parties didn't really mean what they said. It argues that the "without restriction" phrase applied to "shippers" of single owner loads (approximately 80% of the container traffic) but not to consolidated containers. (NYSA Brief 45-47.) In support of this position, NYSA advances the substantially contradicted testimony of its witnesses as to the parties' understanding of that agreement, and attempts to bolster that testimony by citation of sporadic incidents of attempted stuffing and stripping which, as the Board found, occurred coincidentally with waterfront labor negotiations. (199a-200a). NYSA ends with a plea that this Court recognize

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43/ NYSA and ILA have not contended that CEI or Twin function as contractors or "on behalf of" NYSA members under § 8(c) of the 1959 Agreement. The consolidation work of CEI and Twin is clearly not "on behalf of" or "direct contracting out" of NYSA-member work. While consolidators use containers owned or leased by NYSA-member shipping companies, these containers are provided under the express terms of the common carrier tariffs, and not through any contractual arrangement. CEI and its predecessor, Val-Baxt, routinely used the services of all carriers in the New York-Puerto Rico trade, and were unrestricted in so doing by any lease, contract, or subcontract with any carrier. (728a-729a.) In the 1961 FMC Investigation, supra, the Commission found "no indication that any contractual relationship exists between the forwarders as such and carriers." 6 FMC at 333. Moreover, brokerage fees were not paid by the carriers to forwarders in the Puerto Rican trade. Id. at 353. In fact, consolidators generally pay a higher (Freight-All-Kinds) tariff to the carriers for the shipment of their containers. Thus CEI has always been and remains an independent company, operating its own special freight forwarding business, and not acting on behalf of or under any contract with NYSA members.

a special canon of labor law contract interpretation, whereby agreements are to be interpreted not by the spirit and letter of the written agreement, nor by the prior conduct and subsequent actions of the parties, but by what they think twenty years later they should have agreed and done, at least for the purposes of the instant case.[44/] The fact remains that as interpreted and as applied the 1959 and 1964 Agreements showed that shipment of consolidated containers without interference was intended.

ILA contends that it reached the 1959 Agreement in ignorance of the coming growth of containerization. Whatever merit this argument may have[45/] it cannot explain the similar language in the 1964 contract (398a) and, more importantly, that until the 1973 Dublin Rules the containers of established consolidators such as CEI and Twin were stuffed and stripped off the pier without interference by ILA. Moreover, ILA does not deny that containerization was an important issue at all negotiations beginning in 1959 and that ILA has secured

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44/ Wiley v. Livingston, 376 U.S. 543 (1964), and Enterprise Ass'n of Steam, etc., Local No. 638 v. NLRB, 521 F.2d 885 (D.C. Cir. 1975), cited by NYSA, involved extending the provisions and intent of labor agreements to areas not covered. What NYSA seeks to do here is to contradict the express terms of the 1959 and 1964 agreements.

45/ As discussed below, the 1959 and 1964 Agreements are in all material respects in an identical posture to the agreement in Cal Cartage, supra. In Cal Cartage, the Board found that the ILWU had "effectively bargained away" any "make-work rights claimed by longshoremen." 208 NLRB at 996, 85 LRRM at 1302 (emphasis added).

extensive benefits, such as guaranteed income, to cushion the effect of labor saving techniques such as containerization. 46/

Moreover, continuing actions by both ILA and NYSA from the 1959 contract to the present time indicate that both parties understood the 1959 agreement as meaning what it said. This history also shows that both were sensitive to the pace of containerization and sophisticated in bargaining for changes in their agreements throughout this period.

Initially, the parties to the 1959 agreement were unable to agree on an appropriate royalty to be paid on containers not stuffed and stripped by ILA deep-sea labor. Accordingly, they resorted to arbitration, as provided for in Section 8(b) of the agreement. The arbitrators' award (330a et seq.) recognized the clear understanding of the parties to the 1959 agreement:

> Containers may be loaded or stripped on the pier by ILA-labor. They may also be loaded or stripped away from the pier by non-ILA-labor. The latter, commonly, called "shipper-loaded containers," are the subject of the present controversy. 47/

46/ ILA's citation of Standard Electric v. Hamburg, 375 F.2d 943, 945 (2d Cir.), cert. denied, 389 U.S. 831 (1967), is misleading. The quotation as cited by ILA, Brief at 24-25, begins, "[f]ew, if any ... could have foreseen the change ...." The words omitted by ILA are, of course, "in 1936" (emphasis added). Their insertion in the ellipsis substantially changes the impact of the words on the facts in this case.

47/ 334a. The arbitrators received extensive testimonial evidence on the future of containerization and visited the

Footnote continued

In 1963, the ILA claimed the right to strip certain containers at the piers prior to releasing the contents to the consignee. United States Shipping Lines, a member of NYSA, challenged this claim through arbitration, asserting its right under § 8(a) of the 1959 contract to handle the containers in question "without restriction or stripping" by the union. The Port of New York arbitrator held against the union, and U.S. Lines petitioned the New York Supreme Court for enforcement. The court held that the refusal of the ILA to deliver the containers to the consignee without stuffing constituted a violation of the 1959 agreement since that agreement specifically allegated ILA "to deliver these containers to the consignee, without restriction as stripping ...."[48/]

Subsequently, in bargaining for the 1968 contract, NYSA agreed to create an exception to the 1959 agreement, and to change that agreement substantially. The resultant 1968 Rules on Containers represented an entirely new agreement as to containerization. As noted previously, the rules required that containers holding LTL (less than trailer load) shipments

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(Footnote 47 continued)

piers to observe container operations. (338a.) Evidently, both the ILA and NYSA devoted much time and effort to such matters, indicating that subsequent growth in containerization did not greatly surprise either party.

48/ NYSA v. ILA, 48 CCH Labor Cases ¶ 50,973 at 63,932 (N.Y. Sup. Ct. 1963).

originating or destined within a 50-mile radius of the port, the contents of which were not beneficially owned by a single person, would be stripped and stuffed by ILA deep-sea labor.[49/]

As established in the proceedings below, the 1968 Rules were never enforced against established off-pier consolidators such as CEI and Twin. When the ILA finally sought consolidation work in a serious way, it knew how to proceed to do so. The Dublin Rules, issued in 1973, clearly and explicitly spell out ILA's claims.

Thus, the plain language, bargaining histories, judicial interpretation, and most importantly, the consistent practice of ILA and NYSA establish that, at the very least, neither ILA nor NYSA interpreted either the 1959 and 1964 contracts or the 1968 Rules on Containers as applying to established consolidators such as CEI and Twin. The evidentiary basis of the Board's finding of a waiver of consolidated cargo work by ILA is clearly borne out.

49/ The contrast between the 1968 contract and the 1973 "Interpretive Bulletin" adds emphasis to the conclusion that the 1959 contract did not preserve any ILA claim to the work of consolidators. In 1968, no "interpretive bulletin" was issued to "clarify" the terms of the 1959 contract. Rather, a wholly new substantive provision was negotiated, and was expressly recognized as changing the terms of the 1959 contract.

V. THE RELIANCE ON ICTC BY NYSA AND ILA IS MISPLACED.

NYSA and ILA argue that this Court upheld the validity of the 1968 Container Rules[50/] as lawful work presevation measures in the ICTC case, supra. In the present case arising under the NLRA, reliance upon ICTC--a Sherman Act case--is entirely misguided. In ICTC, this Court recognized that an evaluation under the Sherman Act includes issues different from that of work preservation under the NLRA. In fact, the theory of the complaint, and the issue presented both to the District Court and this Court on appeal, was whether the 1968 Rules on Containers, admitted for purposes of the litigation to be valid work preservation, violated or could be misused to violate the antitrust laws. This Court did not have the benefit of an NLRB determination as to whether the 1968 Rules were valid work preservation measures. Most significantly, none of the parties in ICTC challenged defendants' contention that the agreements constituted work preservation measures and this Court made its decision on the uncontested assumption that they were valid.

50/ The subject of ICTC was the 1968 Container Rules. This case addresses the 1973 Dublin Rules enforced for the first time against CEI in 1973. Unlike the 1968 Rules which imposed a tax of $250 on LCL or LTL containers stripped or stuffed off-pier, the 1973 Rules imposed a confiscatory penalty of $1,000. Unlike the 1968 Rules, the 1970 Rules as implemented prevented off-pier consolidators from obtaining any containers whatever from NYSA members.

The background of the ICTC case is instructive. Before bringing its antitrust action, plaintiff ICTC, a consolidator, had filed charges with the NLRB alleging that the Rules on Containers violated §§ 8(b)(4) and 8(e). ICTC also brought a separate court action against NYSA and one of its members, alleging that by refusing to handle containers stuffed and stripped by ICTC, NYSA was seeking to prevent newcomers such as ICTC from establishing a stuffing and stripping operation that competed with the business of NYSA members. This complaint was dismissed by the District Court on the ground that ICTC's invocation of the jurisdiction of the NLRB over essentially the same transactions by the filing of unfair labor practice charges had preempted the court's jurisdiction. (This procedural history is recounted in the District Court opinion in ICTC, 312 F. Supp. 562 (S.D.N.Y. 1970).)[51/] The Regional Director and the General Counsel of the NRLB refused to issue a complaint on the ground that the 1968

51/ On appeal in ICTC, NYSA and ILA argued that this earlier decision was res judicata and that the Sherman Act complaint was similarly preempted. This Court rejected both contentions. On the claim of res judicata, it held:

> The ruling of the court that issues raised in the first action were within the exclusive jurisdiction of the National Labor Relations Board is clearly not determinative of whether in an action based on different allegations and seeking an entirely different remedy, the court must defer to the Board. 426 F.2d at 887.

containerization provisions were deemed valid work preservation provisions designed to protect the traditional work jurisdiction of the longshoremen.[52/]

Plaintiff then brought its antitrust suit against NYSA and ILA under the Sherman Act, claiming that they had combined and conspired to misuse the container rules by refusing to admit it to NYSA membership and refusing to negotiate with it an ILA collective agreement, thus preventing it from competing with the stevedore members of NYSA. 312 F. Supp. at 567-68. ICTC sought a preliminary injunction which was granted by the District Court. The Court of Appeals reversed on the ground that ultimate success of the Sherman Act claim was unlikely.

The Court of Appeals held that the tests of legality of labor agreements under the Sherman Act were twofold:

> The test of whether labor union action is or is not within the prohibitions of the Sherman Act is (1) whether the action is in the union's self-interest in an area which is a proper subject of concern and (2) whether the union is acting in combination with a group of employers. 426 F.2d at 887.

The Court reviewed what it considered to be the background of the 1968 Container Rules as "a bitterly contested

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52/ ICTC could not seek review of the decision of the NLRB's General Counsel. Retail Clerks Local No. 954 v. Rothman, 298 F.2d 330 (D.C. Cir. 1962).

issue in the negotiations between ILA and NYSA" in which "[t]he containerization provisions of the agreement were finally settled upon only after another strike of 56 days." The Court viewed the 1968 Rules as having been "forced" upon "reluctant employers by the union," and "far from aiding and abetting a violation of the Sherman Act by a group of business men." As such, the Court was not persuaded of the probability of success of plaintiff ICTC's allegation of an antitrust conspiracy, i.e., "the product of the kind of combination between Union and employers that is condemned in Allen Bradley Co. v. Local Union 3 [325 U.S. 797 (1945)] ..." where the union "aid[ed] and abet[ted] businessmen to do the precise things which [the Sherman] Act prohibits." Id. at 888.

The Court did find it "readily apparent" that the ILA "was acting in its self-interest, i.e., in the interest of its members," holding that "[u]nion activity having as its object the preservation of jobs for union members is not violative of the antitrust laws." Id. at 887. These labor principles were cited not by way of establishing the lawfulness of the Rules on Containers as work preservation measures under the National Woodwork test, but rather in support of the more general proposition that, assuming a union is acting with the purpose of work preservation, it is acting in its self-interest and thus within an area of proper union concern.

The important point is that in ICTC the Rules on Containers were assumed to be work preservation measures and ICTC did not dispute this characterization. The District Court specifically stated, in its opinion granting the preliminary injunction sought by ICTC:

> For present purposes we do not question the fact that Rule 2, which requires stripping and stuffing by ILA at General Cargo Agreement rates, is a work preservation measure. 312 F. Supp. at 569.

In its supplementary opinion, the District Court denied that it "failed to appreciate defendant's contention that the Rules themselves are fundamentally work preservation measures," 312 F. Supp. at 573-74, and repeated its finding that Rules, "as enforced ... might constitute one element of a scheme to restrain competition." Id. at 573.

In its brief, ICTC did not disagree with the characterization of the Rules on Containers as valid work preservation measures. To the contrary, ICTC explicitly stated:

> ICTC has not attacked the validity of these Rules, for they appear to be job-saving if properly utilized, but it is the illegal anti-competitive implementation by the appellants which ICTC seeks to enjoin. Brief of Appellee Intercontinental Container Transport Corp., at 17. (Emphasis added.)

ICTC argued that the District Court had found as a matter of fact that the Rules on Containers, as enforced by

appellants in the context of NYSA's restrictive membership requirements, might constitute one element of a scheme to restrain competition, rather than merely a work preservation rule, and, if so, would violate the law. Id. ICTC's intent was that its success in the antitrust action would not restrain the Rules on Containers, but "would give force and effect to the proper use of these Rules." Id.[53/] ICTC was arguing that it stood ready to comply with the otherwise lawful containerization rules but was being unlawfully prevented from doing so. This argument--and ICTC's contention that neither res judicata nor preemption by the Board barred its Sherman Act case--would hardly have been furthered by challenging the work preservation character of the rules.

Thus, the ICTC decision stands only for the proposition that the particular plaintiff in ICTC was not likely to prevail on the merits in proving that an agreement assumed to be a valid work preservation measure was in violations of the antitrust laws. The NLRB at the time had not reviewed the Rules, and its only indication to the Court was the action of the Regional Director blocking an NLRB determination on the merits based on his view of their validity. The issue

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53/ By seeking court-ordered admission to NYSA and an ILA agreement, while failing to challenge the validity of the container rules, ICTC sought to avail itself of the benefits of the container rules rather than to defeat them.

of waiver or abandonment, a significant part of this case, was obviously not even mentioned.

In the case at hand the validity of the container rules is directly challenged. The 1973 rules at issue here are more patently secondary than the 1968 rules, and unlike the 1968 rules, the rules now challenged have been enforced for the first time against established consolidators such as CEI and Twin. Moreover, unlike the ICTC case, after a thorough review of the evidence and history of the industry the NLRB has unanimously found the rules now at issue to be invalid.

VI. THE DECISION IN PARALLEL CASES STAND AS PERSUASIVE PRECEDENT IN SUPPORT OF THE NLRB'S DECISION.

Two recent decisions dealing with factual situations nearly parallel to the instant case, and presenting exactly the same legal issues, are far more relevant and persuasive in the present context than is ICTC. These are the NLRB's decisions in the Naval Supply and the Cal Cartage cases, the latter of which was subsequently enforced by the Court of Appeals for the District of Columbia Circuit.[54/] Individually and

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54/ International Longshoremen's Ass'n (U.S. Naval Supply Center), 195 NLRB 273, 79 LRRM 1289 (1972); International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co.), 208 NLRB 994, 85 LRRM 1300 (1974), enforced, 521 F.2d 913 (D.C. Cir. 1975), pet. for cert. filed, 44 USLW 3363 (Nov. 25, 1975) (No. 75-684). PMA and the ILWU have moved that the Supreme Court defer its decision of their petition for certiorari in that case, on the grounds that, if the Court reverses the NLRB case, there will be conflict between the Circuits.

together, they provide precedential support to the Board's application of the doctrine of National Woodwork in the present case.

A. The Naval Supply Case

The Naval Supply case arose from the effort of a local affiliate of ILA to claim work of non-ILA employers of the U.S. Naval Supply Center. The work in question was not only the stuffing and stripping of containers, but also the unloading and loading of break bulk cargo into military or commercial vessels at the Supply Center. The Board held that the ILA could claim neither type of work:

> ILA members had never handled, so far as appears, either break-bulk or container cargo at the Supply Center. Whatever the charter jurisdiction of the ILA, it had not in practice been extended to the Supply Center. This is therefore a case of a 'union seeking to restrict by contract or boycott an employer ... for the purpose of acquiring for its members work that had not previously been theirs.' 79 LRRM at 1290 (emphasis added) quoting from National Woodwork, supra, 386 U.S. at 648 (Harlan J., Mem.).

As the Board found in this case, the logic of Naval Supply is "apposite" here, since in both cases, the ILA "sought to acquire work which traditionally had been performed by employees in other work units." (198a,) Petitioners attempt to distinguish the Naval Supply case on the grounds that the ILA's activities there constituted a "classic secondary boycott." Furthermore, they claim that in the present case ILA has never

"made any demands" on CEI and Twin to "perform the work that has been performed at their places of business." ILA Brief at 38-39.

These contentions are factually and legally wrong. The evidence in the record does show ILA attempts to take over representation of the employees performing container work off pier for CEI. As the Board correctly recognized, National Woodwork specifically states that there "need not be an actual dispute with the boycotted employer" for §§ 8(b)(4) and (e) to apply. 386 U.S. at 645. The Board understood that ILA's objective is clearly and specifically to take work from CEI's employees and give it to ILA members who have never performed that work. (198a.) The ILA's previous direct efforts to accomplish the same end fulfill any necessity for showing "primary activity" against CEI and its employees, as well as demonstrating the secondary nature of the Rules on Containers and their enforcement.

Thus, the Board's decision in Naval Supply is entirely consistent with its decision and order in this case. A true, if not "classic," secondary boycott is proven in this case by the same analysis as in that one.

B. The Cal Cartage Case

Even more persuasive than the Naval Supply case from a precedential viewpoint, and of superior authority, is the West Coast version of the present dispute, as determined by

the NLRB and enforced by the D.C. Circuit. Cal Cartage presented almost an identical work acquisition case, growing out of similar rules on containers, work traditions and bargaining histories. The Board found that the ILWU's effort to acquire consolidated container work constituted an illegal effort to gain the traditional work of teamsters employed by container companies.

The only substantial factual difference between the two cases strengthens the equitable force of the Board decision here. In Cal Cartage the members of the West Coast maritime employers association, PMA, were employing the off pier consolidators as direct subcontractors. Thus, the work in question was consolidation work that had long been performed directly for the account of and pursuant to contract with the PMA maritime shipping companies. In this case, CEI and Twin were operating as independent NVOCC's, seeking and gaining business on their own account and not on behalf of or by contract with the maritime shipping companies.[55/] Surely if the work in question in Cal Cartage was not "fairly claimable" by longshoremen, the same conclusion is even clearer here.

Much of the legal analysis applied by the Board in the Cal Cartage case is applicable here. First, the Board found the same parallel work traditions which are present

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55/ See note 43 supra.

in this case. It held that the stuffing and stripping of containers had been performed for years by both longshoremen and teamsters. The Board also recognized that the ILWU's history of performing part of the work did not support its claim to the rest, which had an independent history of teamster labor. 85 LRRM at 1302.

Further, the Board found that the ILWU had waived its right to any such container work by its adherence to its 1960 Mechanization and Modernization Agreement negotiated with PMA. A comparison with Section 8 of the 1959 ILA-NYSA agreement reveals a much clearer and more straightforward abandonment by the ILA of consolidated container work, supporting the Board's finding on this issue.[56/]

56/ The full text of the relevant provision in that agreement is as follows:

> Cargo received on pallet, lift or cargo boards, or as unitized or packaged loads, shall be considered as having fulfilled the 'first place of rest' requirement when unloaded from the carrier at a place designated by the Employer, and shall not be rehandled before moving to ship's tackle unless so directed by the Employer. Cargo received for shipment but neither palletized nor received as unitized or packaged loans and to be palletized before delivery to ship's tackle shall be palletized by longshoremen only (unless waived by the Union, in writing). Cargo discharged from a vessel on pallet, life, or cargo boards or as packaged or unitized loads shall be considered as having fulfilled the 'last place of rest' requirement, when it is dock stored just as

(Footnote continued)

Finally, the Board recognized in Cal Cartage as in this case, that "the logic of its [the ILWU's] position is that it is entitled to all such container work without regard to the identity of employees."[57/] The results of such an open-ended claim to shipper's loads and all other present off pier container work the Board characterized as "enormous," with the implication that the result would be harmful to the shipping industry and disruptive to labor relations throughout the cargo handling sector. In so finding, the Board clearly followed the mandate of the Supreme Court in National Woodwork, where the Court declared that such "surrounding circumstances" as the "economic personality of the industry" must be taken into account in cases involving work restriction clauses. 386 U.S. at 644-45 n.38.

(Footnote 56 continued)

> it left the hatch. It may be removed by the consignee or his agent, without additional handling, unless depalletizing is ordered or sorting is required by the Employer prior to such removal. After cargo has been placed on the dock after discharge from the vessel, any movement of the cargo to a railway car, any sorting on the dock and any building of loads on pallet boards on the dock shall be done by longshoremen. This will permit the teamsters to load their trucks piece from cargo boards after longshoremen have broken down piles and set loads to the tailgate, floor or loading platform. See Exhibits 2-G-13 & 14, Case No. 21-CC-1326, 208 NLRB No. 130.

57/ 208 NLRB at 966, 85 LRRM at 1302. See 201a.

The Cal Cartage case is thus on all fours with the present one and establishes a legal perspective, bolstered by the enforcement decision of another circuit, by which this Court may view the instant case with profit. From that viewpoint, it is clear that the Board has followed consistent and correct legal principles in both cases.

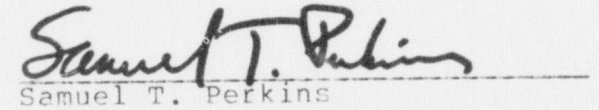
CONCLUSION

For all of the above reasons, intervenor CEI respectfully requests this Court to affirm the decision and enforce the order of the NLRB below, on the basis of the substantial evidence there established as well as the NLRB's correct interpretation of the relevant law.

Dated: February 23, 1976

Respectfully submitted,

Martin D. Schneiderman



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ADDENDUM A

Selected Freight-All-Kinds Tariffs Applicable to Consolidated Containers, 1958-1968.

1.	Pan-Atlantic Steamship Corp.	July 16, 1958
2.	Sea-Land of Puerto Rico	June 9, 1960
3.	Sea-Land Service, Inc.	October 19, 1962
4.	Sea-Land Service, Inc	June 5, 1963
5.	Sea-Land Service, Inc.	November 22, 1965
6.	Sea-Land Service, Inc.	March 15, 1968
7.	Sea-Land Service, Inc.	August 27, 1968

SECTION 3 COMMODITY RATES (Continued)

	In Cents Each
FREIGHT, ALL KINDS (Except as noted), in mixed trailer loads, when loaded in carrier's trailers by shipper and unloaded from carrier's trailers by consignee, moving under a shipper's load and count bill of lading, subject to Notes 1, 2, 3, 4, 6, 7, 8 and 9,	
per trailer	80,000

Note 1 + Freight must consist only of consolidated less-than-truckload shipments, each of which individually weighs 15,000 pounds or less.

Note 2: Household goods, office furniture and fixtures, or personal effects included in a shipment, shall not exceed 10 per cent of the total weight or total cubic measurement (whichever is smaller) of the entire shipment.

Note 3: No freight may be included in shipments which is prohibited by law, or by the provisions of this tariff or Tariff FMB- F No. 4 .

Note 4: Maximum weight loaded in any one trailer shall be [illegible] pounds.

Note 5: Subject to prior arrangements with the carrier, the following provisions will apply:

At Origin: Trailers shall be removed from the terminal of the carrier at Port Newark, N.J. by the shipper for loading at shipper's expense and risk. Shipper shall assume full responsibility for the safety of trailers and chassis while in his possession, and for the safe return of trailers and chassis to said terminal in a clean and sound condition.

At Destination: Trailers shall be removed from the terminal of the carrier at San Juan, P.R., Ponce, P.R., or Mayaguez, P.R. (as billed) by the consignee for unloading at consignee's expense and risk. Consignee shall assume full responsibility for the safety of trailers and chassis while in his possession and for the safe return of trailers and chassis to said terminal in a clean and sound condition.

Each trailer removed from carrier's terminal will be furnished with chassis without additional charge by the carrier, but shipper and consignee shall furnish his own tractor.

(Item continued on page 120)

ISSUED: July 16, 1958 EFFECTIVE: July 21, 1958

Issued By W. C. Farnell, Jr., Traffic Manager
Foot of Doremus Avenue
Port Newark, N.J.

OFFICIAL FILE

Outward
Freight Tariff No. 2

PAN-ATLANTIC STEAMSHIP CORPORATION

Original Page No. 120
FMB - F No. 3

SECTION 3 COMMODITY RATES (Continued)

FREIGHT, ALL KINDS, (except as noted) in mixed trailer loads, when loaded in carrier's trailers by shipper and unloaded from carrier's trailers by consignee, moving under a shipper's load and count bill of lading, subject to Notes 1, 2, 3, 4, 5, 6, 7, 8 and 9.

(continued)

CANCELLED
By L.T. Rev. P 120
3/19/59
Date

Note 6: The per trailer charge will be made for each trailer removed from the carrier's terminal for loading, except that where more than one trailer is used, overflow freight loaded in the last trailer will be charged for at the rate applicable to the actual weight or measurement thereof (whichever is higher) subject to a maximum of 80000 cents for the last trailer. Shipper shall furnish weights and measurements on all packages loaded in the last vehicle otherwise the regular per trailer charge shall apply.

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REGULATION OFFICE
31563 JUL 17 58
FEDERAL MARITIME BOARD

Note 7: Not applicable on refrigerated cargo or on cargo requiring controlled temperatures.

Note 8: Upon request, shipper shall furnish to carrier a manifest for each trailer loaded which shall show by individual shipments the commodity, the number of packages and the weights and dimensions of each such package.

Note 9: The carrier's liability will be limited to $500.00 per trailer where the per trailer charge is assessed. Bill of Lading will bear notation reading:

"Shipper hereby agrees that carrier's liability is limited to $500.00 with respect to the entire contents of each trailer, except when shipper declares a higher valuation and shall have paid additional freight on such declared valuation as provided in Item 1 of General Rules and Regulations."

ISSUED: July 16, 1958

EFFECTIVE: July 21, 1958

Issued by W. J. Farnell Jr., Traffic Manager
Foot of Doremus Avenue
Port Newark, N. J.

for Explanation of Abbreviations and Reference Marks, see Page No. 5

SECTION 3 — COMMODITY RATES (Continued)

	In Cents Each
FREIGHT, ALL KINDS (Except as noted) in mixed trailer loads, when loaded in carrier's trailers by shipper and unloaded from carrier's trailers by consignee, moving under a shipper's load and count bill of lading, subject to Notes 1,2,3,4,5, ◆▲***, 7,8,9 and 10 (Not subject to Item 34). ▲(For the purposes of this entry, each one-third of a single trailer shall consist of that space from floor to ceiling measuring eleven feet, six and one-half inches (11' 6½") running feet).	
▲For each one-third of a single trailer or fraction thereof (but not exceeding two-thirds of a single trailer)	27000
▲Exceeding two-thirds of a single trailer, per trailer.	80000

Note 1: Freight must consist only of consolidated less-than-truck-load shipments, each of which individually weigh 15,000 lbs. or less.

Note 2: Household goods, office furniture and fixtures, or personal effects included in a shipment, shall not exceed 10 percent of the total weight or total cubic measurement (whichever is smaller) of the entire shipment.

Note 3: No freight may be included in shipments which is prohibited by law, or by the provisions of this tariff or Tariff FMB-F No. 4 ▲(Pan-Atlantic Steamship Corporation FMB-F Series).

Note 4: Maximum weight loaded in any one trailer shall be 44,000 pounds.

Note 5: Subject to prior arrangements with the carrier, the following provisions will apply:

AT ORIGIN: Trailers shall be removed from the Terminal of the carrier ▲**** by the shipper for loading at shipper's expense and risk. Shipper shall assume full responsibility for the safety of trailers and chassis while in his possession, and for the safe return of trailers and chassis to said terminal in a clean and sound condition.

AT DESTINATION: Trailers shall be removed from the terminal of the carrier at San Juan, P.R., Ponce, P.R. or Mayaguez, P.R. (as billed) by the consignee for unloading at consignee's expense and risk. Consignee shall assume full responsibility for the safety of trailers and chassis while in his possession and for the safe return of trailers and chassis to said terminal in a clean and sound condition.

Each trailer removed from carrier's terminal will be furnished with chassis without additional charge by the carrier, but shipper and consignee shall furnish his own tractor.

(Item continued on Page 120)

CANCELED
3rd RP 119
3-29-61
DATE

26042 JUN 13
FEDERAL

◆▲*** Reference made to Note 6 ELIMINATED.
▲****Words "at Port Newark, N.J." ELIMINATED.

ISSUED: JUNE 9, 1960

EFFECTIVE: JULY 11, 1960
ISSUED BY: E. J. CORNELL, TRAFFIC MANAGER
FOOT OF DOREMUS AVENUE
POST OFFICE BOX 290
NEWARK, NEW JERSEY

SECTION 3

COMMODITY RATES(Continued)

FREIGHT,ALL KINDS, (Except as noted) in mixed trailer loads, when loaded in carrier's trailers by shipper and unloaded from carrier's trailers by consignee, moving under a shipper's load and count bill of lading, (Subject to Notes 1, 2, 3, 4, 5, ♦♦***, 7, 8, 9 and 10 (Not subject to Item 34). (Continued)

♦♦****

Note 7: Not applicable on refrigerated cargo or on cargo requiring controlled temperatures.

Note 8: Upon request, shipper shall furnish to carrier a manifest for each trailer loaded which shall show by individual shipments the commodity, the number of packages and the weights and dimensions of each such package.

Note 9: The Carrier's liability will be limited to $500.00 per trailer where the per-trailer charge is assessed. Bill of Lading will bear notation reading:

"Shipper hereby agrees that carrier's liability is limited to $500.00 with respect to the entire contents of each trailer, except when shipper declares a higher valuation and shall have paid additional freight on such declared valuation as provided in Item 1 of General Rules and Regulations."

Note 10: General Conditions:

(a) Except as otherwise provided, carrier's responsibility for cargo loaded in its trailers shall not commence until such trailers are returned to carrier's terminal and a receipt given therefor, and carrier's responsibility shall cease upon acceptance of such trailers by consignee at carrier's terminal.

(b) In removing trailers and chassis from carrier's terminals, the responsibility of the shipper or consignee for such trailers and for chassis shall include but not be limited to, public liability, including property damage and personal injury or any such other damages as may be caused in the operation of such trailers and chassis while in possession of the shipper or consignee.

(c) Reference in this item to shipper and/or consignee, shall include their authorized representatives or agents.

CANCELLED
BY
DATE

36042 JUN 19

FEDERAL

♦♦*** Reference made to Note 6 ELIMINATED.
♦♦**** Matter formerly shown ELIMINATED.

ISSUED: JUNE 9, 1960

EFFECTIVE: JULY 11, 1960

E. T. CORNELL, TRAFFIC MANAGER
FOOT OF DOREMUS AVENUE
POST OFFICE BOX 290
NEWARK, NEW JERSEY

OFFICIAL FILE

OUTWARD
IGHT TARIFF NO. 2

SEA-LAND SERVICE, INC.
Puerto Rican Division
FMC-F No. 3
(Pan-Atlantic Steamship Corporation FMC-F Series)

13th Revised Page 119
Cancels
12th Revised Page 119

TION 3

COMMODITY RATES (Continued)

	TL, in Cents Per 100 Lbs. (except as noted)	TL, Minimum Weight in Pounds
IGHT, ALL KINDS (Except as noted) in mixed trailerloads, when loaded in carrier's trailers by shipper or his agent and unloaded from carrier's trailers by consignee or his agent as provided in Item No. 32, (Item No. 34 not applicable), see Notes 1 through 6 inclusive	(1) 80000 cents per trailer	
	(2) 375	22,000
	(2) 335	30,000
	(2) 275	40,000

Note 1 - For purposes of this provision, each trailerload of goods tendered carrier shall be considered as an individual shipment. Each shipment must in turn be comprised of consolidated merchandise made of component lots, which if shipped separately would be considered as less-than-trailerload quantities. Said component lots shall individually weigh 15,000 lbs. or less.

Note 2 - Each shipment tendered under rates named in this item must move from one shipper to one consignee on one bill of lading and must be comprised of not less than three different commodities. The weight of any single commodity shall not exceed seventy (70) per cent of the total weight of the mixed shipment. Any article or group of articles subject to the same generic classification and general commodity description in Section 3 of this tariff shall for purposes of this note be considered the same commodity. Shipper must furnish carrier a complete list of the contents of each trailer and show separately the number of packages, description of goods and gross weight of each article. Upon request shipper must furnish copy of inland carrier's freight bill.

Note 3 - Household goods, used office furniture and fixtures, or personal effects included in a shipment shall not exceed ten (10) per cent of the total weight of said shipment.

Note 4 - Refrigerated cargo or cargo requiring controlled temperature protection, or freight which is prohibited by law or by the provisions of this tariff or Tariff FMC-F No. 4 (Pan-Atlantic Steamship Corporation FMC-F Series) or articles of extraordinary value, such as works of art, jewelry, antiques, deeds, drafts, etc., may not be included under rates named in this provision.

Note 5 - Any shipments not conforming in their entirety to the provisions of this item shall be subject to the application of specific commodity rates as named in Section 3 of this tariff.

Note 6 - Pickup service at point of origin and delivery service at point of destination as described in Freight Tariff No. 3, FMC-F No. 4 (Pan-Atlantic Steamship Corporation FMC-F Series) will not be available to shipments moving under this provision.

CANCELLED By [illegible] Date 12-19-62

RECEIVED

(1) - This rate expires ▲ Nov. 2, 1962 after which rates bearing (2) reference will apply.

(2) - These rates become effective ▲ Nov. 3, 1962.

- Issued on not less than one day's notice authority Federal Maritime Commission Special Permission No. 4046-R

ISSUED: October 19, 1962

EFFECTIVE: October 24, 1962

ISSUED BY: J. F. SHARKEY, TRAFFIC MANAGER
FOOT OF DOREMUS AVENUE
POST OFFICE BOX 290
NEWARK, NEW JERSEY

For Explanation of Reference Marks and Abbreviations, See Page 5.
Correction No. 467.

OFFICE COPY

CANCELLED

SEA-LAND SERVICE, INC.
PUERTO RICAN DIVISION

OUTWARD FREIGHT TARIFF NO. 2 (AMENDING AND RE-ISSUING STEAMSHIP CORPORATION FMC-F SERIES)

15TH REVISED PAGE 119
CANCELS
14TH REVISED PAGE 119

SECTION 3 — COMMODITY RATES (CONTINUED)

By [illegible]

Date [illegible]

	TL, IN CENTS PER 100 LBS.	TL, MINIMUM WEIGHT IN POUNDS
FREIGHT, ALL KINDS (EXCEPT AS NOTED) IN MIXED TRAILERLOADS, WHEN LOADED IN CARRIER'S TRAILERS BY SHIPPER OR HIS AGENT AND UNLOADED FROM CARRIER'S TRAILERS BY CONSIGNEE OR HIS AGENT AS PROVIDED IN ITEM NO. 32, (ITEM NO. 34 NOT APPLICABLE), SEE NOTES 1 THROUGH 88 INCLUSIVE	375	819,200 72[illegible]

NOTE 1 - FOR THE PURPOSES OF THIS PROVISION, EACH TRAILERLOAD OF GOODS TENDERED CARRIER SHALL BE CONSIDERED AS AN INDIVIDUAL SHIPMENT. EACH SHIPMENT MUST IN TURN BE COMPRISED OF CONSOLIDATED MERCHANDISE MADE OF COMPONENT LOTS, WHICH IF SHIPPED SEPARATELY WOULD BE CONSIDERED AS LESS-THAN-TRAILERLOAD QUANTITIES. SAID COMPONENT LOTS SHALL INDIVIDUALLY WEIGH 15,000 LBS. OR LESS.

NOTE 2 - EACH SHIPMENT TENDERED UNDER RATES NAMED IN THIS ITEM MUST MOVE FROM ONE SHIPPER TO ONE CONSIGNEE ON ONE BILL OF LADING AND MUST BE COMPRISED OF NOT LESS THAN THREE DIFFERENT COMMODITIES. THE WEIGHT OF ANY SINGLE COMMODITY SHALL NOT EXCEED SEVENTY (70) PER CENT OF THE TOTAL WEIGHT OF THE MIXED SHIPMENT. ANY ARTICLE OR GROUP OF ARTICLES SUBJECT TO THE SAME GENERIC CLASSIFICATION AND GENERAL COMMODITY DESCRIPTION IN SECTION 3 OF THIS TARIFF SHALL FOR PURPOSES OF THIS NOTE BE CONSIDERED THE SAME COMMODITY. SHIPPER MUST FURNISH CARRIER A COMPLETE LIST OF THE CONTENTS OF EACH TRAILER AND SHOW SEPARATELY THE NUMBER OF PACKAGES, DESCRIPTION OF GOODS AND GROSS WEIGHT OF EACH ARTICLE. UPON REQUEST SHIPPER MUST FURNISH COPY OF INLAND CARRIER'S FREIGHT BILL.

NOTE 3 - HOUSEHOLD GOODS, USED OFFICE FURNITURE AND FIXTURES, OR PERSONAL EFFECTS INCLUDED IN A SHIPMENT SHALL NOT EXCEED TEN (10) PER CENT OF THE TOTAL WEIGHT OF SAID SHIPMENT.

NOTE 4 - REFRIGERATED CARGO OR CARGO REQUIRING CONTROLLED TEMPERATURE PROTECTION, OR FREIGHT WHICH IS PROHIBITED BY LAW OR BY THE PROVISIONS OF THIS TARIFF OR FREIGHT TARIFF NO. 7, FMC-F NO. 3 OR ARTICLES OF EXTRAORDINARY VALUE, SUCH AS WORKS OF ART, JEWELRY, ANTIQUES, DEEDS, DRAFTS, ETC., MAY NOT BE INCLUDED UNDER RATES NAMED IN THIS PROVISION.

NOTE 5 - ANY SHIPMENTS NOT CONFORMING IN THEIR ENTIRETY TO THE PROVISIONS OF THIS ITEM SHALL BE SUBJECT TO THE APPLICATION OF SPECIFIC COMMODITY RATES AS NAMED IN SECTION 3 OF THIS TARIFF.

NOTE 6 - PICKUP SERVICE AT POINT OF ORIGIN AS DESCRIBED IN FREIGHT TARIFF NO. 7, FMC-F NO. 3 WILL NOT BE AFFORDED SHIPMENTS MOVING UNDER THIS PROVISION.

NOTE 7 - DELIVERY SERVICE OF SHIPMENTS TO DESTINATIONS IN PUERTO RICO WILL BE AFFORDED TO POINTS ZONES 1, 1A AND 2 ONLY, AS DESCRIBED IN FREIGHT TARIFF NO. 7, FMC-F NO. 3; PROVIDED, HOWEVER, THAT EACH SHIPMENT SHALL BE DELIVERED TO ONE CONSIGNEE AT A SINGLE PLACE OF DELIVERY.

NOTE 8 - SUBJECT TO MAXIMUM CHARGE OF $836.00 PER TRAILER, WHARFAGE IMPOST AND HANDLING CHARGES (ARRIMO CHARGES) INCLUDED.

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[illegible]

38582 M-563

ISSUED: JUNE 5, 1963

EFFECTIVE: JULY 6, 1963

ISSUED BY: J. F. STARKEY, TRAFFIC MANAGER
FOOT OF DORIMUS AVENUE
POST OFFICE BOX 290
NEWARK, NEW JERSEY

OFFICIAL FILE

OUTWARD
FREIGHT TARIFF NO. 2

SEA-LAND SERVICE, INC.
PUERTO RICAN DIVISION
FMC-F NO. 3
(PAN-ATLANTIC STEAMSHIP CORPORATION FMC-F SERIES)

24TH REVISED PAGE 119
CANCELS
23RD REVISED PAGE 119

SECTION 3 — COMMODITY RATES (CONTINUED)

COMMODITY	
FREIGHT, ALL KINDS (EXCEPT AS NOTED) IN MIXED TRAILERLOADS, WHEN LOADED IN CARRIER'S TRAILERS BY SHIPPER OR HIS AGENT, EXCEPT AS PROVIDED IN NOTE 6, AND UNLOADED FROM CARRIER'S TRAILERS BY CONSIGNEE OR HIS AGENT AS PROVIDED IN ITEM NO. 530 SEA-LAND FREIGHT TARIFF NO. 7-A, FMC-F NO. 10 (ITEM NO. 670 SEA-LAND FREIGHT TARIFF NO. 7-A, FMC-F NO. 10 NOT APPLICABLE), (SEE NOTES 1 THROUGH 8).	$800.00 PER TRAILER

NOTE 1 - FOR THE PURPOSE OF THIS PROVISION EACH TRAILERLOAD OF GOODS TENDERED CARRIER SHALL BE CONSIDERED AS AN INDIVIDUAL SHIPMENT. EACH SHIPMENT MUST IN TURN BE COMPRISED OF CONSOLIDATED MERCHANDISE MADE OF COMPONENT LOTS, WHICH IF SHIPPED SEPARATELY WOULD BE CONSIDERED AS LESS-THAN-TRAILERLOAD QUANTITIES. SAID COMPONENT LOTS SHALL INDIVIDUALLY WEIGHT 15,000 LBS. OR LESS.

NOTE 2 - EACH SHIPMENT TENDERED UNDER RATES NAMED IN THIS ITEM MUST BE COMPRISED OF NOT LESS THAN THREE DIFFERENT COMMODITIES. THE WEIGHT OF ANY SINGLE COMMODITY SHALL NOT EXCEED SEVENTY (70) PER CENT OF THE TOTAL WEIGHT OF THE MIXED SHIPMENT. ANY ARTICLE OR GROUP OF ARTICLES SUBJECT TO THE SAME GENERIC CLASSIFICATION AND GENERAL COMMODITY DESCRIPTION IN THIS TARIFF SHALL FOR PURPOSES OF THIS NOTE BE CONSIDERED THE SAME COMMODITY. SHIPPER MUST FURNISH CARRIER A COMPLETE MANIFEST OF THE CONTENTS OF EACH TRAILER AND SHOW SEPARATELY THE NUMBER OF PACKAGES, DESCRIPTION OF GOODS AND GROSS WEIGHT OF EACH ARTICLE. UPON REQUEST SHIPPER MUST FURNISH COPY OF INLAND CARRIER'S FREIGHT BILL.

NOTE 3 - REFRIGERATED CARGO OR CARGO REQUIRING CONTROLLED TEMPERATURE PROTECTION, OR FREIGHT WHICH IS PROHIBITED BY LAW OR BY THE PROVISIONS OF THIS TARIFF OR SEA-LAND FREIGHT TARIFF NO. 7-A, FMC-F NO. 10 OR ARTICLES OF EXTRAORDINARY VALUE, SUCH AS WORKS OF ART, JEWELRY, ANTIQUES, DEEDS, DRAFTS, ETC., MAY NOT BE INCLUDED UNDER RATES NAMED IN THIS PROVISION.

NOTE 4 - ANY SHIPMENTS NOT CONFORMING IN THEIR ENTIRETY TO THE PROVISIONS OF THIS ITEM SHALL BE SUBJECT TO THE APPLICATION OF SPECIFIC COMMODITY RATES AS NAMED IN SECTION 3 OF THIS TARIFF.

NOTE 5 - PICKUP SERVICE AT POINT OF ORIGIN AS DESCRIBED IN SEA-LAND FREIGHT TARIFF NO. 7-A, FMC-F NO. 10 WILL NOT BE AFFORDED SHIPMENTS MOVING UNDER THIS PROVISION.

NOTE 6 - DELIVERY SERVICE OF SHIPMENTS TO DESTINATIONS IN PUERTO RICO WILL BE AFFORDED TO POINTS IN ZONES 1, 1A, 2 AND 3 ONLY AS PROVIDED IN SEA-LAND FREIGHT TARIFF NO. 7-A, FMC-F NO. 10; PROVIDED, HOWEVER, THAT EACH SHIPMENT SHALL BE DELIVERED TO A SINGLE PLACE OF DELIVERY. (857)

NOTE 7 - CARRIER'S LIABILITY WILL BE LIMITED TO $500.00 PER TRAILER EXCEPT WHEN SHIPPER DECLARES A HIGHER VALUATION AND SHALL HAVE PAID ADDITIONAL CHARGE ON SUCH DECLARED VALUATION AS PROVIDED IN ITEM 590, SEA-LAND FREIGHT TARIFF NO. 7-A, FMC-F NO. 10.

NOTE 8 - UPON PRIOR REQUEST OF SHIPPER AND WHEN TERMINAL SPACE IS AVAILABLE, CARRIER AT ITS ORIGIN TERMINAL, WILL RECEIVE AND CONSOLIDATE INDIVIDUAL SHIPMENTS SUBJECT TO THE FOLLOWING:

A. SERVICES:
   (1) COMPONENT LOTS WILL BE RECEIVED, CONSOLIDATED AND LOADED INTO SEA-LAND TRAILERS AND FORWARDED ONLY IN TRAILERLOAD LOTS.
   (2) FREIGHT WILL BE HELD FOR CONSOLIDATION NOT LONGER THAN THREE WORKING DAYS.
   (3) CARRIER WILL PREPARE A MANIFEST LISTING THE CONTENTS OF EACH TRAILER.
   (4) CARRIER DOES NOT HOLD ITSELF OUT TO LOAD BY CONSIGNEE, MARKS, SUB-CONSIGNEES OR TO PERFORM ANY PRE-SORT OF SEGREGATION OF CARGO.

B. CHARGES:
   (1) FOR PERFORMING CONSOLIDATION SERVICE - $.50 PER 100 LBS.
   (2) FOR PREPARING TRAILER MANIFEST AS PROVIDED IN A (3) ABOVE $3.50 EACH.

C. CONSOLIDATION SERVICES PROVIDED FOR IN THIS NOTE WILL BE AFFORDED ONLY TO SHIPPERS WHO OWN OR BENEFICIALLY OWN THE CARGO TO BE CONSOLIDATED.

(R)

FILED
25 R/P 119
By
4/15/68

ISSUED: NOVEMBER 22, 1965 — EFFECTIVE: DECEMBER 27, 1965

ISSUED BY: J. F. SHARKEY, TRAFFIC MANAGER
POST OFFICE BOX 1050
ELIZABETH, NEW JERSEY

FOR EXPLANATION OF REFERENCE MARKS AND ABBREVIATIONS, SEE PAGE 5.
CORRECTION NO. 1965

SECTION 3 COMMODITY RATES (Continued)

CODE NO.	COMMODITY	
44111	FREIGHT, ALL KINDS (Except as noted) in mixed trailerloads, when loaded in carrier's trailers by shipper or his agent, except as provided in NOTE 8, and unloaded from carrier's trailers by consignee or his agent as provided in Item No. 530 Sea-Land Freight Tariff No. 7-A, FMC-F No. 10 (Item No. 670 Sea-Land Freight Tariff No. 7-A, FMC-F No. 10 not applicable). (See NOTES 1 through 8).	$765.00 per trailer

NOTE 1 - For the purpose of this provision each trailerload of goods tendered carrier shall be considered as an individual shipment. Each shipment must in turn be comprised of consolidated merchandise made of component lots, which if shipped separately would be considered as less-than-trailerload quantities. Said component lots shall individually weigh 15,000 lbs. or less.

NOTE 2 - Each shipment tendered under rates named in this Item must be comprised of not less than three different commodities. The weight of any single commodity shall not exceed seventy (70) percent of the total weight of the mixed shipment. Any article or group of articles subject to the same generic classification and general commodity description in this tariff shall for purposes of this note be considered the same commodity. Shipper must furnish carrier a complete manifest of the contents of each trailer and show separately the number of packages, description of goods and gross weight of each article. Upon request shipper must furnish copy of inland carrier's freight bill.

NOTE 3 - Refrigerated cargo or cargo requiring controlled temperature protection, or freight which is prohibited by law or by the provisions of this tariff or Sea-Land Freight Tariff No. 7-A, FMC-F No. 10 or articles of extraordinary value, such as works of art, jewelry, antiques, furs, drafts, etc., may not be included under rates named in this provision.

NOTE 4 - Any shipments not conforming in their entirety to the provisions of this Item shall be subject to the application of specific commodity rates as named in Section 3 of this tariff.

NOTE 5 - Pickup service at point of origin as described in Sea-Land Freight Tariff No. 7-A, FMC-F No. 10 will not be afforded shipments moving under this provision.

NOTE 6 - Delivery Service of shipments to destinations in Puerto Rico will be afforded to points in Zones 1, 1A, 2 and 3 only as provided in Sea-Land Freight Tariff No. 7-A, FMC-F No. 10; provided, however, that each shipment shall be delivered to a single place of delivery. (857)

NOTE 7 - Carrier's liability will be limited to $500.00 per trailer except when shipper declares a higher valuation and shall have paid additional charge on such declared valuation as provided in Item 590, Sea-Land Freight Tariff No. 7-A, FMC-F No. 10.

(For NOTE 8 see page 119-A)

▲ NOTICE: NOTE 8 has been transferred to Original Page 119-A.

SEA-LAND SERVICE, INC.
PUERTO RICAN DIVISION

OUTWARD FREIGHT TARIFF NO. 2 | FMC-F NO. 3 | Original Page 119-A

(Pan-Atlantic Steamship Corporation FMC-F Series)

SECTION 3 — COMMODITY RATES (Continued)

NOTE 8 - Upon prior request of shipper and when terminal space is available, carrier at its origin terminal, will receive and consolidate individual shipments subject to the following:

A. Services:
   (1) Component lots will be received, consolidated and loaded into Sea-Land trailers and forwarded only in trailerload lots.
   (2) Freight will be held for consolidation not longer than three working days.
   (3) Carrier will prepare a manifest listing the contents of each trailer.
   (4) Carrier does not hold itself out to load by consignee, marks, sub-consignees or to perform any pre-sort of segregation of cargo.

B. Charges:
   (1) For performing consolidation service - $ .30 per 100 lbs.
   (2) For preparing trailer manifest as provided in A(3) above $8.50 each.

C. Consolidation services provided for in this Note will be afforded only to shippers who own or beneficially own the cargo to be consolidated.

FILED By Date SEP 1 1968

NOTE 8, shown above has been transferred from 24th Revised Page 119.

ISSUED: MARCH 15, 1968 — EFFECTIVE APRIL 15, 1968

ISSUED BY: D. T. EVANS, JR., TARIFF PUBLISHING OFFICER
POST OFFICE BOX 1050
ELIZABETH, NEW JERSEY 07207

SECTION 3 COMMODITY RATES (Continued)

CODE NO.	COMMODITY	▲ RATE
44111	FREIGHT, ALL KINDS (Except as noted) in mixed trailerloads, when loaded in carrier's trailers by shipper or his agent, except as provided in NOTE 8, and unloaded from carrier's trailers by consignee or his agent ▲**,▲(Item 560, Sea-Land Freight Tariff No. 7-B, FMC-F No. 16 not applicable)(See NOTES 1 thru 89). . . . . (1207)	$765.00 per trailer

NOTE 1 - For the purpose of this provision each trailerload of goods tendered carrier shall be considered as an individual shipment. Each shipment must in turn be comprised of consolidated merchandise made of component lots, which if shipped separately would be considered as less-than-trailerload quantities. Said component lots shall individually weigh 15,000 lbs. or less.

NOTE 2 - Each shipment tendered under rates named in this Item must be comprised of not less than three different commodities. The weight of any single commodity shall not exceed seventy (70) percent of the total weight of the mixed shipment. Any article or group of articles subject to the same generic classification and general commodity description in this tariff shall for purposes of this note be considered the same commodity. Shipper must furnish carrier a complete manifest of the contents of each trailer and show separately the number of packages, description of goods and gross weight of each article. Upon request shipper must furnish copy of inland carrier's freight bill.

NOTE 3 - Refrigerated cargo or cargo requiring controlled temperature protection, or freight which is prohibited by law or by the provisions of this tariff or▲Sea-Land Freight Tariff No. 7-B, FMC-F No. 16 or articles of extraordinary value, such as works of art, jewelry, antiques, deeds, drafts, etc., may not be included under rates named in this provision.

NOTE 4 - Any shipments not conforming in their entirety to the provisions of this Item shall be subject to the application of specific commodity rates as named in Section 3 of this tariff.

NOTE 5 - Pickup service at point of origin as described in▲Sea-Land Freight Tariff No. 7-B, FMC-F No. 16 will not be afforded shipments moving under this provision.

NOTE 6 - Delivery Service of shipments to destinations in Puerto Rico will be afforded to points in Zones 1, 1A, 2 and 3 only as provided in▲Sea-Land Freight Tariff No. 7-B, FMC-F No. 16; provided, however, that each shipment shall be delivered to a single place of delivery.

NOTE 7 - Carrier's liability will be limited to $500.00 per trailer except when shipper declares a higher valuation and shall have paid additional charge on such declared valuation as provided in▲ Item 50, Sea-Land Freight Tariff No. 7-B, FMC-F No. 16.

▲(Notes cancelled on page 119-A)

** Reference to Item 530 Sea-Land Freight Tariff No. 7-A, FMC-F No. 10; ELIMINATED: No further application.

ISSUED: AUGUST 27, 1968 EFFECTIVE: OCTOBER 1, 1968

ISSUED BY: D. T. EVANS, JR., TARIFF PUBLISHING OFFICER
POST OFFICE BOX 1050
ELIZABETH, NEW JERSEY 07207

SECTION 3 — COMMODITY RATES (Continued)

NOTE 8 - Upon prior request of shipper and when terminal space is available, carrier at its origin terminal, will receive and consolidate individual shipments subject to the following:

A. Services:
(1) Component lots will be received, consolidated and loaded into Sea-Land trailers and forwarded only in trailerload lots.
(2) Freight will be held for consolidation not longer than three working days.
(3) Carrier will prepare a manifest listing the contents of each trailer.
(4) Carrier does not hold itself out to load by consignee, marks, sub-consignees or to perform any pre-sort of segregation of cargo.

B. Charges:
(1) For performing consolidation service - $3.00 per 100 lbs.
(2) For preparing trailer manifest as provided in A (3) above $3.50 each.

C. Consolidation services provided for in this Note will be afforded only to shippers who own or beneficially own the cargo to be consolidated.

NOTE 9- Rate will also apply on mixed trailerload shipments of articles named in Note 10, or mixed trailerloads of articles named in Note 10 and other articles not named therein; also on mixed trailerloads of articles named in Note 11, or mixed trailerloads of articles named in Note 11 and other articles not named therein, subject to the following:

A. Shipments must consist of three or more different commodities. For the purpose of this Note, each article listed in Note 10 and Note 11 will be considered as different.

B. The provisions of Note 1 requiring that "said component lots shall individually weigh 15,000 lbs. or less" will not apply in connection with commodities listed in Notes 10 and 11.

C. The provisions of Note 2 requiring that "the weight of any single commodity shall not exceed seventy (70) percent of the total weight of the mixed shipment" will not apply on commodities listed in Notes 10 and 11, but in lieu thereof, no single commodity may exceed seventy (70) percent of the total volume of the container or trailer used.

NOTE 10- Electric Appliances, Viz:

Baby Dishes
Blenders
Can Openers
Cigarette Lighters
Clocks
Coffee Makers
Coffee Urns
Electrical Appliances, N.O.S.
Fans
Fire Starters
Flashlights
Floor Polishers
Food Cookers
Griddles
Grilles and Waffle Bakers
Hair Curlers
Hair Dryers
Heaters
Heating Pads
Irons, sad
Kettles
Knives, slicing
Manicure Sets
Massagers
Mixers
Rotisseries
Sharpeners
Skillets
Toasters
Toothbrushes
Trays, warming
Vacuum Cleaners

NOTE 11- Plastic Coated Wire Products
Plastic Products and Materials, N.O.S.
Rubber Goods, N.O.S.

(1207)

ADDENDUM B

Excerpt From CEI's Brief to the NLRB in the Proceedings Below Dealing With the Issue of CEI Status as Successor to Val-Baxt.

2. The Erroneous and Unsupported Rejection of CEI's Status as De Facto and De Jure Successor to Val-Baxt's Consolidation Business

Seemingly intending to skirt the issue of the legal significance of the 25-year Val-Baxt/CEI tradition of uninterrupted freight consolidation and container work, Judge Ordman simply fails to recognize CEI as the de facto and de jure successor to the consolidation business of Valencia-Baxt. "Applying the criteria for a finding under Section 10(e) of the Act,"[86/] Judge Ordman "doubt[ed] the sufficiency of the evidence to warrant a finding of successorship." ALJD at 16. At the outset, it is puzzling what Judge Ordman's "criteria" would require for a finding of successorship, since he gave no clue as to his rationale. Throughout his opinion, he alludes to the continuity of consolidation operations between Val-Baxt and CEI, and points out no facts which would indicate the absence of successorship. Thus, he concedes that in 1965, CEI "took over certain of the operations of a preexisting company, Valencia-Baxt, which had been engaged for many years prior thereto in furnishing the kind of services which Consolidated rendered." ALJD at 16 (emphasis added). Moreover, CEI "was performing

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86/ Presumably, Judge Ordman meant to specify § 8(e), rather than § 10(e).

functions which had previously been performed by Valencia-Baxt at the time of the takeover by Consolidated and in substantially the same manner." Id.[87/]

This legal conclusion, which fails to recognize successorship and thus disregards at least 16 years of work history which follows from it, is wholly unsupported by any analysis of the evidence in the record, and must be rejected as clear error under any standards or criteria for successorship ever formulated by the Board.

Valencia-Baxt maintained two distinct operations: a New York-Puerto Rico freight consolidation business and an intra-island Puerto Rico trucking operation. The President and Vice-President of Val-Baxt (Catinchi and Jacobs, respectively), retained sole operating responsibility for the consolidation business.[88/] As a result of a disagreement as to which element of the business should receive the greatest emphasis, the four stockholders of Val-Baxt (including Catinchi and Jacobs) decided to continue both operations, under separate corporate structures. Thus, Catinchi and Jacobs surrendered their shares in Val-Baxt, Inc., and in

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87/ On the other hand, Ordman found that Twin, "unlike Consolidated, did not take over the work of a former enterprise." ALJD at 19.

88/ This discussion, and that which immediatly follows, is a summary of the uncontroverted testimony of Roy Jacobs. See CEI Tr., p. 152, et seq. See also, pp. 10-14, supra.

return, obtained full authority over the established New York-Puerto Rico consolidation business.

Operation of the consolidation business continued without change. CEI became the formal successor to Val-Baxt's NVOCC tariff before the Federal Maritime Commission,[89/] and assumed all liabilities of Val-Baxt's consolidation operations. Val-Baxt's equipment lease with U. S. Trucking was assumed without modification by CEI. See CEI Exhibit P-7. This lease was later modified by letter agreement dated January 27, 1967, between Roy Jacobs of CEI and Percy Marcus of U. S. Trucking, which incorporated the terms of the previous lease. The 1967 modification referred to the previous lease, which had been entered between Val-Baxt, Inc. and U. S. Trucking, as "our present contract." See CEI Exhibit P-8.

CEI took possession of Val-Baxt's customer lists, and contracted for labor with the same trucking company, using the same employees affiliated with the same local union, at the same location.[90/] Not one personnel change resulted from the change in corporate name in 1965. CEI continued Val-Baxt's consolidation operations at the same location. The only change in the consolidation business begun in 1949 was that the enterprise became known as Consolidated Express, Inc.

89/ CEI Ex. P-6.

90/ See Marcus Affidavit, pp. 1, 4; McCarthy Affidavit I, p. 5; Mangan Affidavit I, pp. 6-7.

In the CEI 10(1) proceeding, Judge Lacey not only indicated that the record would support a finding that CEI was the "de facto and de jure successor to Valencia-Baxt,"[91/] but actually concluded, on the basis of the complete record on this subject, that Val-Baxt was "CEI's direct predecessor." 364 F. Supp. at 226. In its brief to Judge Ordman, the ILA actually concedes that Val-Baxt was "the predecessor of Consolidated." ILA Brief to Judge Ordman, pp. 21, 9. Moreover, in the Twin 10(1) proceeding, counsel for NYSA also apparently recognized CEI as the successor to the work tradition of Val-Baxt.[92/] In light of the facts, no other conclusion is possible.

Under any standard or criteria for determining successorship applied by the Board or the courts in cases decided under Sections 8(e) and 8(b)(4) or any other sections of the Act, the facts summarized above would establish CEI as the successor to Valencia-Baxt. The Supreme Court has recently cautioned:

> Particularly in light of the difficulty of the successorship question, the myriad factual

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91/ 364 F. Supp. at 208, n. 2.

92/ In his closing argument in the Twin 10(1) proceeding, counsel for NYSA sought to distinguish the Twin case from that presented by CEI on the basis of CEI's successorship to the long-term work tradition of Val-Baxt. Such a distinction, of course, assumes recognition and acceptance of that successorship -- which was never controverted in the CEI proceedings. See Twin Tr., pp. 227-29. In this regard, Mr. Lambos specifically noted that Twin did not present "a question of concurrent work jurisdiction, as we had in Consolidated." Id. at 230 (emphasis added).

> circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate. (emphasis added) 93/

Moreover, "[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others." 417 U.S. at 263, n. 9.

The facts of this case would not only support a finding of successorship (since every indicia of continuity discussed in Howard Johnson is present here), but actually would meet the test for holding CEI to be the "alter ego" of Val-Baxt, an even more stringent standard. The Court's description of companies held to be the "alter ego" of other enterprises perfectly describes the facts of the transition between Val-Baxt and CEI: 94/

> It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." [citation omitted] Such cases involve a mere technical change in the structure or identity of the employing entity ... without any substantial change in its ownership or management. In those circumstances, courts have had little difficulty

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93/ Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees, etc., 417 U.S. 249, 256 (1974).

94/ Of course, since this issue does not arise in the context of union or employee challenges to corporate disregard of obligations imposed by the Act or by collective bargaining agreements, the motivation of corporate change is not at issue here.

> holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor (emphasis added) 95/

Surely, if the facts are sufficient to impose upon the successor company the legal and contractual obligations of the predecessor, they are sufficient to satisfy the more practical inquiry as to whether a work tradition in fact continued unbroken notwithstanding the chain in corporate identity. As in cases deciding whether an employer is bound by the bargaining obligations of its predecessor, "the crucial question ... is whether the employing industry remains essentially the same after the transfer of ownership." NLRB v. Zayre Corp., ___ F.2d ___, 62 CCH Labor Cases ¶ 10,853 at p. 18,763 (5th Cir. 1970).

Regardless of the complexity, or simplicity, of the legal transfer, the Board and the courts will look through the legalities to determine whether an employer is a successor. See NLRB v. Tempest Shirt Mfg. Co., 285 F.2d 1, 41 CCH Labor Cases ¶ 16,679 (5th Cir. 1960); NLRB v. McFarland, 306 F.2d 219, 45 CCH Labor Cases ¶ 17,723 (10th Cir. 1962); Loren Service Inc., 208 NLRB No. 115, 1974 CCH NLRB ¶ 26,192 (1974). Significantly, the fact that a corporate transfer, merger, or acquisition results in the splitting of the

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95/ 417 U.S. at 159. See also Associated Transport Co. of Texas, 194 NLRB No. 12, 1972 CCH NLRB ¶ 23,632 (1971).

certified bargaining unit will not destroy the status of the employer as a successor. Lloyd A. Fry Roofing Co., 192 NLRB No. 117, 1971 CCH NLRB ¶ 23,379 (1971); Quaker Tool & Die, Inc., 162 NLRB No. 124, 1967 CCH NLRB ¶ 21,060, enforced, 403 F.2d 1021, 59 CCH Labor Cases ¶ 13,059 (6th Cir. 1968).

It has been established that one entity is the successor to another, under the National Labor Relations Act, if it has "performed substantially identical operations ... servicing the same facilities for the same customer[s] in substantially the same manner and at the same work sites, and utilizing for that purpose the former ... work force who performed the same functions, and exercised the same skills."[96/] Under well-established Board standards, the judgment must focus upon the continuity of the operation, not the continuity of legal structure.[97/]

96/ Maintenance, Inc., 148 NLRB No. 114, 57 LRRM 1129, 1130 (1964); see also Ranch-Way, Inc., 203 NLRB No. 118, 83 LRRM 1197 (1973), supplementing 183 NLRB No. 116, 74 LRRM 1389.

97/ See Glenn Goulding (Fed-Mart), 165 NLRB No. 22, 65 LRRM 1303, 1304 (1967); Maintenance, Inc., supra, 57 LRRM at 1130. Even under the Patent Law, one entity may be considered the "successor in business" to another, thereby entitling it to assume existing patent rights, without assimilating "the entire corporate, or legal business existence of the predecessor, whether through merger, acquisition, etc." Drilling Well Control, Inc. v. Dresser Industries, Inc., 340 F. Supp. 1266, 1283 (S.D. Tex. 1971).

Valencia-Baxt's consolidation operations have continued essentially unchanged, in unbroken succession, through Consolidated Express, the direct heir to facilities, operations, and employment relationships begun by Val-Baxt in 1949. Judge Ordman's failure to recognize CEI as the actual and legal successor to Val-Baxt's consolidation and container operations is clear error, and cannot be supported under any reasonable standard or criteria for successorship. Once CEI's status as successor to Val-Baxt's consolidation operations is recognized, it is particularly important to address the 26-year history of consolidation and container work traditionally performed by teamsters and other non-ILA labor off the docks. CEI's right to continue to perform its services in a field which it pioneered must be protected under Sections 8(e) and 8(b)(4), if those sections are to have any meaning. Particulary when the entire 26-year tradition of non-ILA consolidation is considered, only the most spurious analysis of National Woodwork and its progeny would permit the Rules on Containers and the "Dublin Rules" to be enforced against CEI.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of this Brief was served this 23rd day of February, 1976 by first class mail upon the following:

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